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International Court of Justice

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Official transcript of the International Military Tribunal in the matter of The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Goering, et al, Defendants, sitting at Nurnberg, Germany, on 1 March 1946, 1000-1300, Lord Justice Lawrence presiding.

THE PRESIDENT: At the conclusion of the argument on the organizations, which the Tribunal anticipates will finish before the end of today's session, the Tribunal will adjourn into closed session. Tomorrow morning at 10 o'clock the Tribunal will sit in open session for consideration of the applications for witnesses and documents by the second four Defendants. Will the Defendant's Counsel who was in the middle of his argument now continue? Dr. Merkel, had you finished?

DR. MERKEL (Counsel for the Gestapo): Yes, sir.

DR. LOEFFLER (Counsel for the SA): High Court, the objection made yesterday by the defense, regarding the accusation of the six accused organizations, affects very particularly the question of the SA.

In the case of no organization is there such a danger of an offense against one's feeling of justice than in the case of the SA. I request of the high court permission to submit reasons for this fact.

The application on the part of the Prosecution that the SA should be considered criminal affects, conservatively estimating, at least four million people. As useful as the subdivision was that Justice Jackson gave his approval to yesterday, nevertheless its effect in terms of numbers is not relevant, because the groups eliminated yesterday, the SA wehr units and other groups, did not actually belong to the inner membership of the SA, so that so far only the SA reserve has been exempted.

But since, on the other hand, a temporal limitation was not made, there will in this proceeding, be included all who belonged to the SA during the twenty-four years of its existence, between its foundation in the year 1921 and its dissolution in 1945, that is to say, a period of almost a quarter century. All those who were at any time during that long period, members, are under indictment.

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We heard yesterday from the Prosecution that the criminal acts of which the organizations are accused are the same of which the main Defendants are accused, namely, crimes against peace, crimes against the usages and customs of war, and crimes against humanity, as well as participation in the general conspiracy.

If we contemplate the possible participation of these four million people in these four possible categories of crimes, then we see the following: Crimes against the customs and usages of war are not held against the SA. The Prosecution presented an affidavit, according to which the SA also took part in watching concentration camps and prisoners of war camps, and also the guarding of forced labor; but, according to the presentation of the Prosecution, this occurred only in 1944 for the first time, within the scope of the total war taking place at that time, and it was not asserted that at that time the SA committed any excesses or mistreatment.

Of all the cruelties of which we have heard here in documents and through witnesses, the SA, with its four million members, was never concerned. The few offenses against humanity of which the SA is accused by the Prosecution, and of which individual members in the course of almost a quarter century have been guilty, can in no way be compared or equated with the serious crimes against humanity of which we have heard now.

The other point brought up by the Prosecution, namely, the occupation of union property, happened on the instifation of Reichsleiter Ley, who used the SA for this operation, and this happened after Hitler's seizure of power.

The Prosecution also did not assert that in the execution of this operation any ill treatment, excesses, or violent actions took place. In connection with the seizure of power in the Spring of 1933, that individual excesses occurred, and that Rosemann and Klauber, according to the affidavit submitted by the Prosecution, were in connection with those events beaten, is certainly deplorable, but such excesses of individual people are unavoidable in such movements involving millions of people and are hardly designed to serve as grounds for declaring the whole organization criminal.

The participation, finally, of the SA as guard troops in concentration camps is, according to the presentation of the Prosecution, a unique exception,

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and it ended anyway in the year 1934. The guard of concentration camp Oranienburg, according to the presentation of the Prosecution, was an SA Scharfuehrer. Nevertheless, it is not asserted that he committed any crueltie

The second case, the ill treatment of prisoners in the camp of Hohenstein, by SA and SS members, in the year 1934, led to a criminal proceeding, and the guilty SA men were sentenced to six years.

As a last individual act, there remains the participation of the SA in the excesses of the 10th to 11th of November, 1938, when the windows of Jewish stores were broken, synagogues were burned, and so on. Here, too, the plan and the order did not originate with the SA. It was given by the highest Party leadership, and the SA was simply commissioned with its execution.

Thus, we finally consider that in the period between 1921 and 1933 the old SA, in the political struggles of that time, was involved in street fights with political opponents, during which, nevertheless, in many cases their activity was of a defensive nature, but that the growth of the SA to an organization embracing millions of people took place only after Hitler's seizure of power. Then we see the following numerical picture:

Punishable individual acts, on the basis of the presentation of the Prosecution, were committed by at most 2 percent of all the indicted former SA members; 98 percent of the four million, according to their conviction, kept their hands clean of any such individual punishable acts.

Here, too, the Prosecution will not want to insist that the excesses of this 2 percent should serve to have the whole organization declared criminal. This 98 percent, that is, 3,900,000 previous SA members, must, nevertheless, find themselves here defendants in this trial, accused of having waged aggressive war or in the planning or carrying out of the general conspiracy; or, even more strongly formulated, accused of having belonged to organizations which pursued these criminal aims.

What is the result if we accept this definition of the criminal nature of an organization? That definition formulated yesterday by Justice Jackson and Sir David, the SA members as they were defined to us yesterday in Points 1 and 2 -- the SA must also submit to this definition, namely, that the SA was a union of numerous people, and their collective aims were principally voluntary

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membership. But, particularly in the case of Points 3, 4, and 5, we must strenuously object to their application to the SA. Number 3 requires that the organization pursued objectively criminal aims in the sense of Article 6 of the Charter.

The millions of people, if they were to be heard here, would testify that neither in the program nor in the speeches of their leaders had they recognized that they were called upon to carry out such goals. Whether the leaders of the SA pursued such goals in secret, that the individual member is not in a position to judge. Whether such criminal goals were pursued secretly by the leadership of the SA, it is possible that this be determined only by the high court, and only after the archives have been opened, after the witnesses have testified, and that the whole framework should be laid open to the perusal of the Court.

Now, point four of the Prosecution's definition, if I understood Justice Jackson correctly yesterday, requires as a definition of the criminal nature of the organization, that the crimes and methods of these organizations had such character that a reasonable, normal man can be accused to having known of these things.

I should like at this point to emphasize particularly that I, in collaboration with my colleagues, do not accept this definition as adequate for it means that a member can then be punished if he had not recognized the criminal nature of the organization but reasonable care should have enabled him to recognize that criminal nature. I know of no penal code in a modern state in which negligence, even of a serious nature, is sufficient grounds to prove guilt in a serious crime, as of a crime of a nature so serious of which these people are accused. Such a crime can only be committed intentionally. Perhaps the Prosecution can later on the grounds of the knowledge of the particulars make some statement on this matter.

This point seems particularly important to me because there is otherwise the danger that the Justices, particularly the Anglo-Saxon judges, will apply the political standards of their countries to German conditions. The sober political instinct that is characteristic of the citizens of England and America is lacking the Germans. We are a politically immature people, easily

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misled and consequently susceptible to political seduction. The Court should take this into consideration in passing its judgment on the good faith of the various organizations.

According to the previous impressions that the Defense has derived from its visits to camps, from a large number of letters and so on, a vast number of SA members are convinced that they did not belong to any criminal organization. Among other reasons are the following subjective ones.

It was generally known and as is shown in Document 1893-PS, page 365, it is specifically stated that only those would be accepted in the SA whose character are altogether unobjectionable. It is further stated verbatim, and I quote, "unobjectionable behavior and references." The members of the SA state that they know of no case in which any criminals or band of conspirators require such entrance requirements.

It is part of the nature of a conspiracy that it should be held secret and that its criminal goals should not become known to the enemy. An organization of several millions, is, by its very nature, not designed to carry out a plot. The leaders of the SA emphasized in many addresses that they wanted to maintain peace under all circumstances. They pointed out that Germany, without means of defense, without arms in the very center of Europe, was no more a danger to European peace and that being in a state of preparedness was the best guarantee of European peace.

The individual members point out again and again that foreign powers gave diplomatic recognition to the leaders of the Nazi Party. That was not simply international courtesy but the expression of the conviction that foreign governments would have had no intercourse with the German Government if that German Government were composed of obvious criminals.

I might mention a particularly characteristic example. The Indictment against the SA is substantiated by a number of documents. These are documents 22, 28 and 23 PS. According to these documents, even in May of 1933, a deputy of the Reich War Ministry, Colonel Auleeb, was transferred to the highest command of the SA in order to assure liaison between the two organizations. But the entire occurrence is treated as strictly secret and it is stated that Auleeb, in order to camouflage himself, should not wear the SA uniform.

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How, I ask, could a single SA member know anything of such events?

I have here mentioned only a very few points that I bring forth in the interests of the SA members. The Defense wishes to make no gratuitous assumptions.

I simply wish to state that the members of the SA were never aware that they were members of a criminal organization. Also the criterion set up yesterday by the Prosecution to define a criminal organization, the close connection between the main defendants and the SA, is in the case of no organization so difficult to establish as in the case of the SA. This may, at first, sound very surprising since of the main defendants here six were high members of the SA. Nevertheless, a closer scrutiny shows that their connections were in no case close connections. Besides Goering, none of the main defendants ever had command authority over the entire SA. The rank that these main defendants had in the SA was an honorary rank and to a large extent simply decorative.

The Prosecution, in its recent summary of the criminal elements, has mentioned only Goering's connection with the SA but even Goering's connection with the SA curiously enough is very slight and is confined actually to the period of three-quarters of a year, that is for nine months, mainly from February 1923 to November 1923, that is to say twenty-seven years ago. Goering was never, as he is accused in Appendix A of the Indictment, Reichsfuehrer of the SA. That is an error. Rather in February, 1923, Goering was commissioned with the command of the Sturmabteilung that the Party had at that time.

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Goering led the SA until the November Putsch of the 9th of November 1923. After that, his command over the SA vanished and was never revived. Later, Goering received from Hitler honorary leadership of the Standarte Feldherrnhalle. He was, however, not commander of this unit.

The difference between membership in and command of a regiment must be generally known. I do not have to dilate upon it further. Honorary membership is a purely decorative function. The tasks that the SA had to carry out under Goering in the year 1923 were safeguarding of meetings. It cannot be asserted that at that time the SA, along with Goering, had anything to do with planning the crimes stated in Article 6 of the Charter, or that those acts had already been formulated or could have been anticipated at that time. It also cannot be asserted that after the year 1923 Goering made use of the SA for the execution of any criminal plan.

The man who led the SA from 1930 to 1934, Roehm, was a bitter opponent of Goering's. After his death, the SA, from 1934 to 1943 was led by Victor Lutze, and then, until its dissolution, by Wilhelm Schepmann.

According to Paragraph 9, Subsection 1 of the Charter, an organization can only be comdemned in connection with an action on account of which one of the main defendants is being tried. From the legal and reality point of view, I have the gravest doubts whether the events I have just spoken of suffice for the requirement of the Indictment. I ask that the High Court not look upon Goering's activities as honorary member of the SA 23 years ago as criminal. On the other hand, this entire event was settled by the amnesty of the democratic government in Germany at that time, which amnesty was granted to the SA at that time.

The fact is apparent to the High Court that in the case of any organization, and certainly in the case of the SA, inclusion among the numbers of the criminal organization does not correspond to reality. Large circles in foreign countries, particularly those who had to leave Germany in 1933, knew nothing of the complete change of structure which the SA went through in the following years. The foreign countries heard, from

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every Reichstag meeting, "The SA marches," whereas, as a matter of fact, it had lost all political influence, and in its size had become numerically enormous. It was precisely for that reason it had become innocuous from any conspiratorial point of view, nor could it have been used for any criminal act.

I refer here to the statement made by Colonel Storey in his presentation. This is on page 1546 of the court record.

"The organization by which the SA was then completely excluded from political life was, as everyone knows, the SS, and this occurred in connection with the so-called Roehm Putsch in the year 1934."

It was precisely the SA and SS who confronted each other always as inimical brothers, a fact that in the interests of truth should not remain unmentioned. The opinion of the SA is, for all these reasons, also in the case of the Germans, even under National Socialism, a completely different one, and this has already led to contradictory occurrences the elimination of which by the Prosecution or the Court would be highly desirable.

This is the time to point out the following: The SA, up to the higher ranks, is not susceptible to being taken into custody, in contradistinction to the other organizations. The new Denazification Law which, after these things were talked over with German circles and the Military Government, came into effect and which is now law throughout the American Zone, regards all SA members in the lower ranks, such as that of Sturmfuehrer, neither as active Nazis nor as criminals. Since, in the American Zone, the laws regarding who can vote have now been formulated, and under those laws in thousands of German communities voting took place under the direction of the Military Government, the simple SA members, so far as they were not Party members, were not simply actively permitted to vote, but the same people who are here accused before the Court of serious crimes, at the same time, according to valid law, could right now be chosen as Community Councillors.

I spoke personally two weeks ago with an SA man and asked him whether, on the request of the Court, he had reported here for interrogation. He reported that he saw no reason for that because in themeantime he had been

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elected and approved as a Community Councillor.

The regulations of Law No. 30 regarding the organization of German communities, 30 December 1945, Paragraphs 36 and 37, in which eligibility to be elected is defined, state also the fact known in all Germany, but apparently not in foreign countries, concerning a simple Party member who had no active political life, any more than the purely uninfluential SA man. Whoever was a member before 1937 cannot vote, and whoever was a Party member cannot be elected.

The relationship between Party members, who are not being indicted here, and the SA members, who are indicted here, is as follows:

If at the time of National Socialism one was politically suspect one could, without difficulty, become an SA member, but under no circumstances a Party member because, in relationship to Party membership, higher political requirements were made than in the case of the SA membership. There were certainly many SA members who belonged to this organization only in order to remove the blemishes of their suspect political life.

High Tribunal, I have tried, by the examples I have presented here, to show one extreme danger which exists, particularly in the case of the SA, if a judgement is passed that concerns up to millions of simple SA men, if these millions of people are declared by this Court to be criminal.

The opinion that Justice Jackson expressed yesterday, that it was here a case of the verdict to be passed by this Court of a purely abstract judgment with no punishment mentioned -- I cannot agree with that.

I know that hundreds and thousands of SA members, harmless hanger-on who weren't even members of the Party, have been inculpated, and their existence and income will

be endangered by the passing of this verdict. But for them to be banned and dealt with as I have just described, the verdict of this Court would be enough.

It should be pointed out that the SA lacks the right to legal hearing. The evidence being submitted is not direct evidence. A Court does not decide the fate of lifeless forms or organizations that have long since ceased to exist; it passes judgment on living, human beings, and no court should fail to look those in the face whom they are considering condemning. A good court is a good judge of character and can judge, by having the person in front of them, whether he is a criminal or not.

No criminal procedure at any time has passed judgment on an organization or allowed such a passing of a judgment. The laws cited yesterday by the prosecution regarding conspiracy certainly define to a large extent the participation of members in a conspiracy, but two requirements were made even in these cases; Firstly, the member must know that he is party to a criminal plot or conspiracy; and secondly, the Indictment is not directed toward the conspiracy as such, and it is not the conspiracy that will be condemned but the individual participants.

It is the conviction of the defense that the Charter did not want to stand in contradiction to these legal principles of all states.

The late President Roosevelt, who can be considered as the spiritual father of the Charter, in his greatest speeches, particularly in that of the 25th of October, 1941, and others, clearly stated that the leaders shall be judged.

Permit me to read two sentences from the book of the addresses of Franklin D. Roosevelt, published by the Government of the United States.

I quote from the speech of the 25th of October, 1941:

"Civilized nations have long recognized the principle that no one shall be punished for the crimes of another."

The second quotation is from the speech of President Roosevelt on the 7th of October, 1942, and I quote:

"The number of those held guilty will, compared with the total population of the enemy countries, undoubtedly appear extraordinarily slight. The Governments of the United States and its Allies intend no mass reprisals, but we are determined to punish the leaders as they deserve

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for the planned murder of thousands of innocent people and those deeds of terror for which they are responsible, and every Christian principle that they have offended."

To these types of considerations there is also a technical one that must be considered.

The Tribunal's decision regarding the organization will affect millions of people. It will put these millions of people in a twilight zone of banishment which will only be ended after the subsequent trials have been held. Until that time every individual is under serious suspicion of being a criminal, since it is questionable whether he will succeed, in the subsequent trial, in exonerating himself. But since an individual person, with such a frustration, would probably not be able to re-enter his profession--and until he is exonerated will be excluded from the ranks of honorable citizens--we are depriving him of the right for such a subsequent trial, and we do not have the right to do so.

I believe that Justice Jackson will agree to this. But if, as the prosecution requires, seven million members of organizations should be affected by the judgment of the Tribunal, and so be condemned to this twilight region of banishment, then millions of subsequent trials will have to take place. We shall have to assume that in one year, perhaps, a hundred thousand trials willhave to be carried out. I believe that that is a very conservative estimate.

Our German courts will not be able to help out in this. They are, as everyone knows, greatly overworked since they have now only a small portion of their previous personnel. The courts, for these millions of cases, will probably have to treat those first whose criminal nature is most suspect. The others, for whom it is a question of their existence, will defend themselves with all the legal means at their disposal. It is probable that the person who is really innocent will have to wait years, even decades, before he will have an opportunity to exonerate himself and so rehabilitate himself.

I believe that the possibility might have existed in some way or another to find a way out of this dilemma if the Control Council had passed the necessary laws, since the suspicion arises that the organizations mentioned have committed crimes against peace and humanity. Consequently

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the courts have the right and duty, for those of whom it can be proved that they were participating in these crimes in any form, to call them to judgment.

If such a formulation could be found, then I believe that both the prosecution and the defense would recognize in that a just solution. This problem would then be limited to those who actually could have guilt proved against them.

The defense objects in no way to the punishment of those who are guilty, provided that their guilt is once and for all determined in an open trial.

Should the Court decide to pass a verdict against the organizations, as the prosecution has requested, then I ask, for the reasons that I have just given, from the picture that the prosecution will now draw of the case, that the condemnation of the SA should not be pronounced.

The point of view that Justice Jackson outlined in the case of the other organizations--for instance, the various murders and cruelties, where the individual perpetrators can no longer be determined--this consideration does not apply to the SA. The few excesses which, according to the presentation of the prosecution, took place, did so only in Germany. The perpetrators are known. Individual regional courts have already instituted proceedings against these people.

We have heard, for example, that the City of Bamberg took action against the destroyers of the synogogue, and that the perpetrators of these deeds, on the 10th and 11th of November, 1938, were called to trial.

Should the Tribunal be of the opinion that the SA as an organization should be condemned, then I ask the Tribunal, so far as possible, to make use of the right which both the prosecution and defense recognize as theirs, to limit the condemnation in terms of classes and time.

A very important discrimination is to be made here. For one, the SA members who, after the accession or seizure of power in 1933, entered the SA, joined an organization that had State approval. Certainly a state authority cannot make a matter of law the commiting of crimes against humanity. But the question of finding out who is

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guilty, nevertheless, plays a considerable role in the question of whether or not the perpetrator acts outside the laws enforced, and against the positive law, or whether his acts, although they may offend against a higher order, do not, nevertheless, stand in contradiction to the laws of his country.

Of the SA members, those, at any rate, should be excluded or exempted who entered after 1933, and of whom it can be demonstrated that they took no part in the events of the 10th of November, 1938.

In regard to the distinctions that should be made in terms of categories, I should like to request a double limitation. First, single SA members up to the rank of Sturmfuehrer should be exempted under any circumstances and, wherever possible, soon.

I mentioned previously why, in the interests of justice, at least in the American Zone, this appears advisable to me. Perhaps--and I should be very glad to see this--Justice Jackson would have the kindness to give this matter his personal consideration.

I have expressed the desire for such limitation because in this way the number is considerably reduced by a large number of innocent hangers-on, and also the technical difficulties, which seem almost insurmountable, would be considerably lightened.

The Prosecution yesterday was kind enough to exempt the Wehrmannschaften of the SA. In the interests of justice and equality before law, which apply to this high Court, all those special units that only performed organizational functions in the SA should also be separated from the SA. It is here a question of the Marine SA and the Reiter SA.

The Court has a number of applications before it, and it is well known in Germany that precisely these units were concerned with sports, on the one hand, with horsemanship and the holding of tournaments, and that these were their prime interests. When the Party achieved power, it attempted to take over all the sport life in Germany. Consequently, the various sport groups were affiliated with the SA,

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but they had nothing to do with the SA's political activities. Organizationally speaking, they were subordinate to the SA, but they were actually a completely closed group within the SA.

None of the main Defendants here present was ever a member of one of these sporting groups. Members of the Higher SA felt themselves to be at a particular disadvantage because the N. S. Kraftfahrkorps and the N. S. Fliegerkorps, with perfect right, are not here indicted, since their sporting character was recognized. The N. S. Kraftfahrkorps and the N. S. Fliegerkorps were, however, until the year 1934 exactly as in the case of the Reiterkorps, subdivisions of the SA. The N. S. Kraftfahrkorps had the same duties as the N. S. Fliegerkorps. The N. S. Reiterkorps, on the other hand, could not withdraw itself from this political influence, and only succeeded in establishing itself in the year 1936 as a self-contained unit. However, it still remained connected in its leadership with the SA; through the Chief of the SA it was organizationally connected with the SA.

About a hundred thousand persons who enjoyed sport opportunities in this Organization are here indicted, but they never took part in any of the activities with which the SA is usually identified.

Even after the first world war it was obvious that the horse had no further role in war; and as to the Kraftfahrkorps and the Fliegerkorps, the Prosecution stated, with right, the non-political nature of these Organizations.

I should be thankful to the Prosecution if the cases I have mentioned would be reviewed again by them to see whether or not the same conditions are not present in the case of these Organizations as in the case of the SA Wehrmannschaften and the SA Reserve.

I mention last the SA Hochschulsturme, for this reason, that almost without exception they were simply Organizations for such students who, without any proof of activity in such Organizations, would not be admissible to state examinations.

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The same is true of the SA Sanitaetssturme, which was a recreational activity group for many physicians.

I should like to correct myself on one point, which has been called to my attention by one of my colleagues, because I wanted to set a time limit regarding SA membership after 1933. I should have said after the 30th of January, 1933, the day of the seizure of power.

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In conclusion, I should like to say a few words about the recruitment of SA members. Most of the members of the SA are now free. If only a few so far have written to the Court, this is almost explicitly to be traced back to the fact that since the SA is generally considered in the country to be harmless, they can hardly imagine that a Court with the experience and significance of this Tribunal could reach any other conclusion but that one. This, however, the Court should decide against the SA.

Then I should like to refer to the application made yesterday by the Prosecution to the effect that the members should make an effort to appear in their own defense. I refer to remarks made by the Defense Counsel for the Leadership Corps, that direct contact between Defense Counsel and his clients is here lacking. In the case of the SA and their people, a subsidiary authority should be appointed, for the various departments to carry out different trials against members of the SA. Every individual member of an organization could, with the help of this official, answer those questions to the Court which are to be found relevant. In a way, we were glad to hear Justice Jackson's statement yesterday. If I understood him correctly, he stated that in the trial of the organizations, because of its fateful importance for millions of people, the consideration of justice is much more important than the consideration of speed.

I should therefore like to make reference now to the statements made by the Defense for the Leadership Corps, that the trial of the organizations should be viewed from a different point of view from the trial against the main Defendants.

Members of the Tribunal, I am at the conclusion of my remarks. I should like, however, to reply to the words uttered by Jackson at the beginning of his address. He said that for the first time in history a modern state had completely collapsed and that this capitulation presented the victor nations with completely new problems; that the most important thing was to destroy the structure of those organizations and to prevent this country from ever again waging aggressive war. All persons of good will must welcome this goal and will support Justice Jackson, but it is questionable

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whether this is a correct means toward that end -- to condemn all organization members as such, involving millions of people.

I ask the High Court to consider that there is hardly one family in the whole country who does not have near relatives that were in some way connected with one of these organizations at some time or other. The organizations are dead, the system of terror and lying has disintegrated, millions of deceived people have turned away from those who led and seduced them; but if now they find themselves branded and ostracized, the effect would probably be the opposite of that which we all had hoped for.

Justice Jackson correctly pointed out in his speech yesterday that the Control Council believed -- and we are in favor -- that in the problem of denazification, in this case previous experience should be helpful, namely that a schematic treatment of such a problem is an offense against one's sense of justice and consequently a challenge to solidarity. The individual hanger-on of an organization would in such a verdict find less manifestation of justice than an active revenge; but the leaders could conceal their real guilt behind the backs of millions of people. The effect of such a verdict would consequently be weakened and would not any longer be that of just punishment.

(A recess was taken).

DR. LOEFFLER: I ask the Tribunal that I be permitted to make one more remark.

In my previous motions, I did not mention an entire group, that is the Stahlhelm, and only for the reason that according to my material at hand, the Stahlhelm organization after the accession to power was absorbed in its entirety into the SA. Therefore, in my opinion, it was included in the declaration made yesterday by Justice Jackson to exclude certain groups.

DR. BABEL (Counsel for the SS and SD): May it please the Court, also in the interest of a speedy trial I wouldhave considered it essential that the Defense should take a position on the statements of the Tribunal and the Prosecution and that only then, when the numerous statements of the Prosecution will have been received in writing by the Defense, will the Defense be in a position to take a conclusive attitude toward all the

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questions. Since a number of Defense Counsel for the organizations have already spoken, I see it is necessary to do the same, in so far as I am in a position to do so at this time, and consider it necessary and essential.

The Tribunal desires to have a discussion in order to formulate the legal definition of a criminal organization and in particular an examination of the problems which facts are needed to declare an organization a criminal one. It is now believed that a final, conclusive and basic definition of this entirely new concept can only be given at the end of the proceeding, after collecting and examining all necessary factual material that has come before this proceeding. The Prosecution has already presented the definition, but there are a series of objections, because the legal attitude is one that has been formed in other countries outside of Germany, under different circumstances and it is all fraught with legal consequences, since the Tribunal is right now in the full view of the German people and the entire world.

Among the organizations which are now under indictment there are mostly large mass organizations, without their own will, which would have come from the masses, which have aims and purposes which were given by the Party policies, and activities prescribed by the Party. All that has developed to national dimensions. For some of these organizations a just definition can only be found if all elements concerning the purpose, the will and the actions of these organizations and their members have been examined

Considering the basic difference of organizations which have been and are now under examination, it is questionable whether it can at all be possible to apply the fundamental ideas for the judgment as to these organizations. The Prosecution and Defense are agreed that the indictment is directed really not against organizations, which do not exist any more, but in reality against the former membership. Likewise, we can assume that the agreement exists on the fact that the Tribunal in principle will give to the members an actual possibility, not only a theoretical one, of being heard on the question of criminal character. That follows, a fortiori, since according to Law No. 10 the possibility of the members making any objections concerning themselves and the organizations is excluded.

If the Tribunal measures the responsibility of the entire organizations

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as the responsibility of the individuals, there exists a danger of a generalization which in its extent would be much worse than the so-called Sippenhaftung of the Third Reich which included innocent members of the families in proceeding against a member of the family which was accused of criminal acts.

From the definition of a criminal organization there comes the necessity to have known about the intentions and the actions of the organization as a member and it is identical with the principal laws of justice and dignity that before any individual be tried--all the more before the trial against millions--that they should be informed about the indictment individually and that they should individually have the opportunity to be heard.

This demand becomes tremendous in consideration of the serious consequences with which these members are threatened in case of a verdict--loss of property, long punishment, loss of liberty and even the death penalty.

Lastly, the hearing of all members is essential also for the following reasons:

For the development of this legal definition of a criminal character, it is necessary to have an unlimited collection of legal material. The defense does not ignore the fact that these principal demands regarding the extent of the trial provide tremendous difficulties. The extent and the duration of the trial, however, should not reduce the thoroughness of the procedure but should increase it.

May it please the Tribunal, there are businessmen who are owners of several firms. If, now, the owner of a firm uses one of them to permit criminal acts, can we say that the other firms and their employees are also criminals?

Based on this principle, I consider it absolutely essential to point out which organization, according to the reasons given by the Prosecution so far, are affected by the accusations against the SS. They are, first, the General SS, the Allgemeine SS. At the beginning of the war, about 550,000 men. In this number there is a variety of special units: horsemen, motormen, despatchers, and many other units.

Second, the Waffen SS, of which, at the end of the war, there were still under arms about 600,000 men. In this entire number of Waffen SS there were about 36 divisions of the Army and a large number of reserve units, as well as all those who have been dismissed from the Waffen SS for several reasons.

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The verdict in this trial would affect the honor of the dead and the fate of their relatives, so that, also, the dead should have to be included in the number of those who are affected by a verdict in this trial. The total number of members of the Waffen SS, especially including those who have been dismissed as incapable for war service, would be a multiple figure of the one I have given.

On the basis of examinations which are on the way, the Defense will submit still more material, unless this is being done by the Prosecution, which in my opinion should submit to the Court this material which would be helpful.

Third, the Death Head Units. Before 1939, about 6,000 men.

Fourth, SS Verfuegungstruppe, Leibstandarte Adolf Hitler, Before 1939, about 9,000 men.

Fifth, Honorary Leaders of the SS, whose number is supposed to be very large. For instance, the present leaders of the Reichsnaehrstand, Baurrn Fuehrer, all the way down to the Reich Peasant Leaders were mostly nominated honorary leaders of the SS. There are similar conditions with respect to officials of several branches of the administration, of whom many, without their own doing, had become honorary leaders of the SS, withou being able to do anything against it. Many leaders also of the Reichs Comba League received honorary leadership offices of the SS.

Sixth, the sponsoring members of the SS, among which there were also many non-Party members. Their number is not yet known, but it is certainly very large.

Seventh, SS Relief Organization, Deutsche Reichspost.

Eighth, SS Building Department.

Ninth, SS Front Laborrer.

Tenth, the entire Order Police, among which there were (a) the Schutzpolizei of the Reich with several special units, as Traffic, Accident, Message, and Medical Units; (b) the Gendarmerie, with many stations and posts, was distributed all over the country, including small villages and hamlets and did their service since Napoleon's time without considerable change. To do traffic service, there was a motorized unit. (c) Schutzpolizei, police of small villages and towns. (d) the Order Police. (e) the Fire Police. (f) Technische Nothilfe Units.

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THE PRESIDENT: Dr. Babel, you are going rather fast if you want us to take down these categories.

DR. BABEL: Mr. President, I will present a copy to the Tribunal containing all these various units.

THE PRESIDENT: Personally, I prefer to understand the argument when I hear it.

DR. BABEL: May I continue?

THE PRESIDENT: Yes, certainly.

DR. BABEL: I repeat, a technical unit, the Technische Nothilfe; the Freiwillige und Pflicht Feuerwehr, which is the firefighting units, police and gendarmerie, the air warden police, security and auxiliary service, and the Stadt and Landwacht.

Further, there were among the Ordnung Polizei the following central institutions; the hospital of the police, the police officers' school, the technical police school, the police sports and riding schools, police and gendarmerie schools, the fire fighting schools, the automobile and traffic schools, air warden teaching staff, laboratory and teaching institutions.

In 1942 all these individual units of the Ordnung Polizei, including the troop police units, comprised about 570,000 men. If we follow the Prosecution, then all these groups mentioned, institutions and organizations belong to the SS.

Eleventh: All the units of the Security Police which did not belong to the Gestapo and the SD and which, as such, were indicted; that is, officers and employees of the criminal police.

Twelfth: The Volksdeutsche Mittelstelle.

Thirteen: The offices of the Reichskommissariat for the Strengthening of Germanism.

Fourteen: National Political Schools.

Fifteen: Lebensborn, E. V.

Sixteen: The SS Female Helpers.

All these groups, institutions, and sub-organizations were under the administration and jurisdiction of the SS.

In conclusion, the Defense believes that in the entire circle of the SS under the indictment against the SS are several millions; that the final verdict will also affect the members of their families indirectly so that further millions will be affected personally, morally and economically. Since, besides the SS, the large organizations of the SA

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and the Leadership Corps are under indictment, a verdict against these organizations would mean a discrimination against a considerable part of the German nation.

According to Law No. 10 of the Control Council, every member may be, merely for being a member of an organization which has been considered criminal, punished with all punishments, including death. That Law No. 10 answers the question which has been put to discussion as to which objections could be made in this collective procedure and which objections could be made later in the individual. This has been decided by the mentioned law -- that the objections of defendants, for instance, who had no knowledge of the criminal nature of the organization could not be accepted. It is, therefore, necessary that the extent of the procedure in this trial should be stretched as far as possible.

It should be made possible for the Defense, with regard to conclusions which the Prosecution is drawing now, retroactively, to counteract these conclusions. The Tribunal has already, on the occasion of the submission of material against individual defendants, ruled to accept evidence if there is only the slightest possibility of its relevancy. Considering the importance of the decision of this Court for millions of people affected and their families, the admission of evidence to the furthest extent in order to facilitate a just verdict, in order to clarify the facts and in order to state to what extent members of the SS were connected with any criminal acts according to Article 6 of the Charter, that would be absolutely necessary.

Concerning the question whether, based on the fact of the extent of the actions which the Prosecution has mentioned, that the members knew about these things, it would be necessary to admit matters of proof in a large number concerning the question if and to what extent the members of theSS knew about its actions, and these facts will prove that the members of the SS, as well as the majority of the German people, did not know anything about these facts because they were kept highly secret.

The discussion which the trial has suggested concerning the question of proof would mean that the Court would come to a decision on many questions already now without the presentation of evidence by the Defense.

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The law has not defined the fact of criminal organizations. That can not be helped by the fact that proof will only be admitted from one side, for thereby the trial would exclude a large amount of counterproof.

After what I have said, I believe that it will be necessary that the procedure should take into consideration all elements which had to do with the decision of the question whether the SS is a criminal organization.

Within this trial, however, which according to the Charter, should be conducted expeditiously, expedition would not be possible. Therefore, I move that the procedure against the SS and the SD be separated from the trial against the individual defendants.

On 15 January 1946, partly for other reasons, I made that motion. As far as I know, that has not been decided yet. I repeat this motion, and it is this:

On the basis of the procedure up to now I have come to the opinion that the accusation against the organizations of the SS and the SD, for which I have been selected as counsel--and probably the other organizations under indictment--within this trial is not possible for factual and legal reasons.

First, from the legal point of view, I only say the following:

A, The competence of the International Military Tribunal is not given. On this I want to say that a few days ago I saw in a newspaper article that the objection of incompetence has already been made on 20 November 1945 and has been rejected by the Court. I asked for a copy of the transcript of this date and also for the following days, and I have not received it as of this date. Therefore, I could neither check on the motion nor the reasons given, nor the decision of the Tribunal.

B. A penal procedure against an organization is not admissible, especially against an organization which has been dissolved.

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C. To select a defendant's counsel for an organisation which does not exist is not admissible and not possible. Second, I am forced to make more detailed statements in order to give reasons for my motion.

On the 19th of November 1945 I was told that the International Military Tribunal requested my nomination as the defendant's counsel for the Leadership Corps. I declared my agreement in writing.

On the 20th of November 1945 I was told that I had to accept the defense of the organizations of the SS and SD. On the 21st of November 1945 I was told again that I was selected as defense counsel for the SS and SD, and that I would receive the written declaration to that effect soon. On the 23rd of November 1945 I received that letter. It was written on the 22nd in the English language, and a few days later I received, as requested, a German translation. This is the text of the letter and the translation which I have received:

"According to the decision of the International Military Tribunal, you are hereby requested in the case against Goering and accomplices to take the defense of the members of the SS, including the Sicherheits Dienst, known as SD. Motions filed with the General Secretary are to be made according to the decree of the International Military Tribunal."

A few days later I received a file with about twenty-five letters from members of the SS and from relatives to the General Secretary of the International Military Tribunal. When I asked about my position and the position of these people who had made these motions, I was told that these applications were to be presented to the Tribunal in an adequate form.

On the 23rd of November 1945 there was a discussion, a conference, during which a number of questions and suggestions about the duties and privileges of the members of the organizations were made, and also about the defense counsel who had been provided for them.

Beginning from the 28th of November 1945 until the 11 of December I have examined applications by members of the SS and SD. At that time about twenty-five applications which I received daily, upon request, I had to return on the evening of the same day, and then I couldn't receive any more, although I asked several times each day to get them. I was told every time that the Tribunal needs them and that they had not been returned.

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When I received that folder again on the 11th of December 1945 there were many more applications in there.

In December 1945, according to the translation which I have received, the Tribunal decided that a member of the organizations in the Indictment who had made application to be heard concerning the criminal character of the organization was not to be considered a s a defendant but was to have only the individual status of a witness, although he has the right to present evidence; furthermore, that defense counsel who are defending one of the groups of organizations may, for this group or organization, exercise the rights which, according to the Charter, are reserved for the defense of individual defendants.

After the 11th of December, in a closed session of the Court, in which also counsel for the organizations were present, the Tribunal issued the decree of 17 December 1945, of which I received a German translation only a few days later. In this decree the Court ruled that the respective defense counsel, that is, of the organizations, should only represent the groups and organizations and not individual applicants. From this day on only the extent of my duties was definitely limited and defined.

THE PRESIDENT: Can you hear what I say? The Tribunal would like to know what your ap lication now is. The object of this session is to have an argument from counsel for the prosecution and counsel for the defense in order that the legal questions with reference to these organizations should be clear, and what your personal experience during November and December of 1945 has to do with it the Tribunal is unable to see.

DR. BABEL: Mr. President, before I started the reading of this motion I pointed out that already on the 15th of January I made a motion to separate the procedure against the organizations, and there was no decision made until now. I have tried to repeat the reasons for this motion which I then made. If the Court does not think it necessary, I do not have to do it.

THE PRESIDENT: I don't see any relevance in what you have been reading to us now either to the question of whether there should be a separate trial or to any other questions with reference to the criminal organizations.

DR. BABEL: Mr. President, under the circumstances I will omit the further statement, which is known to the Court by my written application, and I will come to the end of what I still want to say as such.

THE PRESIDENT: Dr. Babel, the Court will, of course, consider the suggestion which has been made, I think, by other counsel for the organizatio as well as the suggestion which I understand you are now making, that it is necessary to have a separate trial. The Court will consider that. But what you have been saying to us does not appear to me to have any relevance to that.

DR. BABEL: Mr. President, with my former motion I wanted only to point out the difficulties I had, since I was all alone and had no assistance--difficulties I had until I was at all in a position to dedicate myself to my real task; and also for that reason at that time, in my opinion, my motion for separating the trial was well founded.

What I said then I repeat now, at least most of it. What I have read so far and what I still have written in my motion would have more meaning to it, but I will not read it now, since the question of the separation of the procedures has already been brought up by other defense counsel. Therefore, I can also express my agreement with the motions my colleagues have made.

In this connection I would like to point out that on the 17th of Januar 1946 I made a motion to be relieved of the defense of the SD. I think I will have to point out I have two points to this, because I am not speaking of the SA today, because I have still been waiting for a decision on that motion. After I receive a transcript of the 18th of February I will be able to say some more about the question of the membership of individuals in the SS as to limitations in time, and, as far as the organization is concerned, the question of voluntary membership and other reasons, and the jurisdiction of the SS Corps.

In view of the tremendous amount of work which I had to do, it was not possible for me until today to make detailed statements about all these questions. I also want to say that the suggestions which have been made by the Prosecution and several of the defense counsel do not seem acceptabl

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to me, because they mean a definite limitation of the defense, and that does not seem to be possible.

This is the end of my statement.

THE PRESIDENT: The Tribunal will now adjourn.

(A recess was taken until 1400 hours.)

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Official transcript of the International Military Tribunal in the matter of The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al, Defendants, sitting at Nurnberg, Germany, on 1 March 1946, 1400-700, Lord Justice Lawrence presiding.

THE PRESIDENT: The Tribunal has decided to alter the order of procedure and they will therefore not sit in open session tomorrow but sit in closed session tomorrow, Saturday, and sit on Monday in order to hear the applications for witnesses and documents by the next four defendants in open session; and also, if necessary, on Monday to hear the other next defendants in order, their applications for witnesses and documents.

Now, there is another counsel for the organizations to be heard, is there not?

DR. LATERNSER (counsel for General Staff and OKW): The main subject of the discussion that has taken place today and yesterday, on the wishes of the Court, is the question as to what is relevant evidence in the case against the accused organizations. As a preliminary question to that, particularly the concept of the criminal organization must be clarified.

It is not the task of the defense counsel for the organization to hold down defense arguments -- that should be reserved for the later conclusive briefs -- rather the subject of discussion is limited for the defense to the above-mentioned question of the relevance of evidence, and also to certain basic questions which must be touched upon for any valuation of the relevance of evidence in this case.

According to the sequence the indictment is drawn up in, Dr. Kubuschok spoke first as defense counsel for the Reich Government. In his address he treated the general question associated with the decision of the Court on the 15th of December 1945. In order to avoid unnecessary repetition I should like in my statement to state my attitude, and like to refer in every respect to my colleague Kubuschok. I associate that with my request that the Tribunal directed particular attention to the content of the address delivered yesterday by Dr. Kubuschok.

To the question of the definition of the concept "criminal

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organization", I should like to make a few short remarks and additions. It is obviously a well-considered provision in the Charter that the Tribunal can declare the indicted organizations all criminal; that in other words, it is not obliged to do so but can exercise its free and obligatory discretion.

If the Tribunal comes to the conclusion that a declaration that the organizations are criminal would lead to impossible, untenable, and unjust conclusions or consequences, then the rejection of the prosecution's application would be simply a matter of course.

It has already been stated by those who have spoken what enormous legal difficulties a declaration that the organizations are criminal would accomplish for the members of those organizations, and that also the vast majority of the innocent members would be affected by that decision. So far as these consequences concern the members, it can not be asserted vigorously enough that all the members of the organization will be affected immediately by a declaration that the organizations are criminal. Insofar as the verdict of the Court is concerned it would be irrefutably established that they are accused of a crime, namely a crime of having belonged to an organization that has been declared criminal; That this membership is a crime is to be seen in all clarity in Articles X and XI of the Charter. In Article X it is stated that the authorized courts of the individual occupation zones have the right to put on trial all members of organizations that have been declared criminal. It is further specified that in this trial the criminal character of the organization can no longer be disputed. If, in other words, the members can be accused because of membership in the organization, and if every indictment before a court can, of course, have only a crime as its object, then it is already established that membership in the organization is a crime. Furthermore, in Article XI of the Charter membership in an organization declared criminal is specifically named as a crime. That is to be seen in the words of the Article itself, which reads:

"Because of another crime than the membership in a criminal group or organization."

In the same way, in the law passed to implement the Charter on the

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20th of December 1945, membership in an organization declared criminal is specifically called a crime. From this it can be seen that the declaration of the criminal character of the organization by the Tribunal will have the immediate effect, immediate consequences, for all members that they through their membership in the organization have committed a crime. That must necessarily lead to untenable consequences.

It is not correct to say that these members can exculpate themselves in the subsequent trials in the individual military courts. If the mere membership in the organization is defined as a crime, they can object when they are accused only that they were not members of the organization.

If Justice Jackson is of the opinion that they could in the subsequent trials object that they became members through coercion or through deception, the admissibility of this objection seems to be highly questionable.

Justice Jackson himself pointed out that the appeal to personal or economic disadvantage could not serve as ground for such a coercion. What coercion then could be considered a valid excuse? According to German law only physical coercion could come into consideration here, and that only for the period of the thing. Here too the fear of personal or economic disadvantage could be no exoneration for the persons remaining in the organization. Thus a member of an organization declared criminal has in his subsequent trial only the possibility of presenting certain grounds of exoneration which might influence the extent of his punishment. The question is now whether according to the principles of justice these necessary consequences are tolerable. So far as it is a question of innocent members, this question can be answered only with a decided negation.

Justice Jackson is further of the opinion that

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innocent members of the organization probably can not be found at all because it is simply not comprehensible to a healthy human understanding that anyone would have entered the indicated organization without having known from the very beginning or at least from soon after the beginning what goals and methods the organizations were pursuing. This point of view might appear comprehensible to the observer regarding it in retrospect, after the crimes of which the organizations are accused have been assembled and exposed. That the attitude at that time of the members regarding the goals and tasks was or could have been entirely different can be doubted by anyone. If we accepted Justice Jackson's interpretation of this, then the provision of Article IX of the Charter, providing for the participation of the members of the organizations in their criminal character, would have no meaning.

It would be then entirely superfluous to permit any sort of proofs in that direction, and it would further be unnecessary to discuss the criminal charact As the Tribunal has itself suggested, if we should accept Justice Jackson's statement that according to healthy, human understanding all the members took part in the crimes recognizing them as such, then the provisions regarding the common conspiracy and common plan would suffice altogether as to declare all of these members on those grounds alone without exception guilty. Then the structure of the declaration of criminality and the formulation or the structu of its consequences would in no way be necessary that the declaration of the criminality of the organization is not necessary but could be assentuous, could be seen from the following consideration.

Justice Jackson declared that no one was guilty of accusing all the member of the organization, and which would have precipitated a whole flock of trials which could not be dealt with in a generation. What will be done then is to seek out and find only those who are really guilty, and against them trials will be undertaken. For that reason it is not in any way requisite to create such a great circle of members through the declaration of criminality and from it to accuse the guilty. This selection then may take place without the creation of this circle. But in an organization of many members there were obviously a number of innocent members is a fact that can not be disputed.

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Not only the Charter contains this thought, but also the prosecution has taken it into consideration in that it wishes to exempt from any organization the category with less power; and to do so is the obvious conviction that they had nothing to do with the crime, otherwise they would have been members or participants in the criminal conspiracy. Besides this category, however, a number of other members come into question here of whom one can not speak of as guilty in the legal sense of the term; especially those people who did not concern themselves at all with the aims of the organization. All of these people would not only be dishonored by a declaration of criminality of the organization but simply because of their membership would be punishable if they were indicted or called to trial. That they should be threatened or destroyed simply because they belonged to the organization and should be hurt in their economic life or defamed because of this declaration of criminality I shall mention only in passing. But again it must be asked whether all these consequences, according to the principle of all penal systems, according to which the innocent are to be punished, and according to the principle of material justice whether the Tribunal could accept the responsibility for such a judgment. That must be denied all the more forcibly when if the verdict of the Court affects the members in such a way that they receive no legal hearing.

It has already been pointed out that the right to a legal hearing is withdrawn from the vast majority of the members for technical reasons. From that the unique situation arises that the Tribunal would pass verdict on all those members without knowing whether or not numerous innocent people would thereby be affected.

When Justice Jackson further pointed out that the proceedings here being promulgated is nothing new, but can be found in the penal codes of all other states and particularly in the penal code of Germany, then this attitude can not at all be accepted. The German laws and legal precedents that we cited are of an entirely different character from the structure of the Charter. Germany like almost all other states, knows of no such thing as punishment of organizations, but simply exclusively of the punishment of individual persons. No German judgment was ever passed through which an organization as such was

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was punished or was declared criminal. It is altogether possible, to be sure, that in the trials against members of criminal organizations the criminal character of the organization was stated as such in the reasons given for the judgment, but this statement had the effect upon the punished members and not toward others who were neither accused nor condemned.

The mentioned provisions of paragraph 128 and 129 of the German Penal Code precisely corroborate the attitude taken by the defense, because they threatened exclusively the participation in an illegal union with penalty but not the union itself.

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Also, in those that were cited by the French there was a question whether only participation and membership in the organizations in question or whether those organizations having punishable purposes and means could be punished. A possibility of declaring the organization itself criminal is not to be found in these laws either. The French Prosecutor cited, first of all, Articles 265 and 266 of the Code Penale. The first provision forbids the construction of organizations with punishable purposes. Second, only the participants of such an organization were punishable. Also, the French law on the fighting units and civil organizations of the 10th of January 1936, have forced these punishments only for the participants. The same is true of the other cited law of the 28th, 1944, which only provides for individual responsibility. None of the above-mentioned laws allow the punishment of organizations.

There is consequently the report of the interpretation raised by the defense. If, exceptionally, in England and in America organizations as such can be punished, then that can only be done because of certain groups of criminals and always in such a way that either the dissolution of the organization or fines are ordered. Naturally, it is also in this trial the presupposition of the Prosecution and of the judgment that the organization as such is represented in front of the Court and can defend itself. However, in the previously mentioned procedure, the organizations as such are brought in front of the Court, although they and their organism do not exist any longer. It has never been the case in any country that organizations are declared to be guilty or criminal and that, on the basis of this declaration of the Court, all members of the organizations can be accused and punished because of their membership. It is this which is completely new and unique in contrast to previous law in any land of the world.

I believe I may state that England or America would never agree to pass such a law for their own population. It is thereby proved that the declaration of criminality that the Prosecution demands would automatically lead to the above listed syllogism and entirely untenable consequences. Then it can be seen that the application of the Prosecution must be rejected in the name of justice. Thereby, also, the Charter that in no way obliges the Court to make such a statement, would not be offended; an injustice

would then be avoided, that could only damage the integrity of the decision of the Tribunal in present and future times.

My presentation leads to the conclusion that, firstly, the Court, for the above mentioned reason, principally must reject the declaration that an organization is criminal or, secondly, in the other case, the concept of the criminal organizations must be so understood that the innocent members are protected from the serious consequences.

This can only be brought about by a definition as suggested by my colleague Kubuschok. Accordingly, also, the themes of evidence such as he presented yesterday must also be allowed if they are not irrelevant for the reason that for legal reasons the application of the Prosecution shall not be granted. For the group that I represent of the General Staff of the OKW, the demand is necessary that following all proof, themes should be permitted; (1) In the case of the group called here "The General Staff of the OKW", neither is there any such group nor is there any such organization. I shall justify that statement as follows:

(a) Justice Jackson is of the opinion that a "group" is a larger concept than the concept "organization". That doesnot have to be defined but can simply be understood by common sense. To this must be added those who occupied the highest and the higher command posts. There were the higher officers of the military hierarchy as they are in every army in the world. Any recognizable relationship between the members of this group did not exist. These relationships cannot be assumed through the official contact they had with each other, nor than the actually existing chain of command.

Since, further, in the circle of these people who are included in this indictment has been admitted completely arbitrary, only on the basis of the fact that these people in the period of eight years occupied official positions, there is no union that could justify the assumption that this was a unified group. But it is absolutely essential to the concept of the group that, along with the purely official connection, there should be also a unifying element.

(b) Besides the Chiefs of the General Staff, the army, and the air force, none of the individual people in the group belonged to the General

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Staff. The General Staff of the Army and the Air Force--the Navy had no General Staff--were subordinate to the Chief of the General Staff, consisted of the General Staff officers who acted as assistants to the higher military leaders. Consequently, the indictment has given to this imaginary group a false and misleading designation or name.

Second theme: I here apply arguments delivered by Kubuschok to the theme of the General Staff and the OKW. The occupants of the offices in the group are not as voluntary members of the group nor did they remain in the group voluntarily. The admissibility of this theme of evidence is necessary for the following reasons:

(a) Justice Jackson stated yesterday that the entrance or the membership to a group must be voluntary. This present condition does not apply to the group which I represent. The indicted higher military leaders for the greatest part had precedence in the Kaiser's Army. All had served long before 1933 in the Reichswehr of the Weimar Republic. They did not join any group but were officers of the Wehrmacht and achieved a position that they were not at liberty to choose, only on the grounds of their military achievement. They were not at liberty, without offending against the rules of military obedience, to withdraw from these positions that they occupied.

Thirdly, all themes of admissible evidence are to be allowed which are related in the summing up of the arguments to the arguments and accusation against the group of the General Staff and the OKW. These points could be brought about in this way:

Firstly, a number of participants should deliver sworn affidavits, from the contents of which conclusions could be drawn regarding the typical attitude of a certain number of those involved.

Secondly, individual typical representatives of the group could be interrogated about the themes of relevant evidence that has here been discussed and do so before the Tribunal.

Thirdly, every other sort of evidence of probative value should be admitted as far as it is necessary.

These proofs must for the time being be left to a decision later on, to the complete extent, as Justice Jackson, during the case of the Prosecution suggested, on the 14th of December 1945, that for today a binding decision regarding the relevancy cannot yet be reached. Whether this

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Staff. The General Staff of the Army and the Air Force--the Navy had no General Staff--were subordinate to the Chief of the General Staff, consisted of the General Staff officers who acted as assistants to the higher military leaders. Consequently, the indictment has given to this imaginary group a false and misleading designation or name.

Second theme: I here apply arguments delivered by Kubuschok to the theme of the General Staff and the OKW. The occupants of the offices in the group are not as voluntary members of the group nor did they remain in the group voluntarily. The admissibility of this theme of evidence is necessary for the following reasons:

(a) Justice Jackson stated yesterday that the entrance or the membership to a group must be voluntary. This present condition does not apply to the group which I represent. The indicted higher military leaders for the greatest part had precedence in the Kaiser's Army. All had served long before 1933 in the Reichswehr of the Weimar Republic. They did not join any group but were officers of the Wehrmacht and achieved a position that they were not at liberty to choose, only on the grounds of their military achievement. They were not at liberty, without offending against the rules of military obedience, to withdraw from these positions that they occupied.

Thirdly, all themes of admissible evidence are to be allowed which are related in the summing up of the arguments to the arguments and accusation against the group of the General Staff and the OKW. These points could be brought about in this way:

Firstly, a number of participants should deliver sworn affidavits, from the contents of which conclusions could be drawn regarding the typical attitude of a certain number of those involved.

Secondly, individual typical representatives of the group could be interrogated about the themes of relevant evidence that has here been discussed and do so before the Tribunal.

Thirdly, every other sort of evidence of probative value should be admitted as far as it is necessary.

These proofs must for the time being be left to a decision later on, to the complete extent, as Justice Jackson, during the case of the Prosecution suggested, on the 14th of December 1945, that for today a binding decision regarding the relevancy cannot yet be reached. Whether this

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evidence is necessary at all and whether and to what extent they are relevant depends on the following:

(1) Whether the Court would on the basis of the point of view brought up by the defense reject the application that these organizations be declared criminal; and (2), as in the other cases, the concept of the criminal groups and organizations is determined.

These two points cannot at present be definitely be decided. Since there is still a great deal to be said about the significance and, in part, completely new problems as well as over the impressive and deeply sought out exposition of Justice Jackson, one of my colleagues is now busy working all these problems and questions into a conclusive document which will be ready in two or three weeks. I ask that I and my colleague be allowed to take a definite position at that time. One last point: The Court would have to decide about the treatment of the last word for the organization.

THE PRESIDENT: Mr. Justice Jackson, the Tribunal would be glad to hear you in reply.

JUSTICE JACKSON: I think there is not much that I care to say in reply, but there are one or two points which I would like to cover. It has been suggested that there be a separation of the trial of the issues of the organizations from the trial now pending. I think that is impossible under the Charter. I think the trial must proceed as a unit. Of course, it is possible to take up at separate times different parts of the trial, but the jurisdiction conferred by Article 9 for the trial of organizations is limited. It is at the trial of any individual member, of any group, etc., that this decision must be reached and it must be in connection with any act of which the individual may be convicted. So I think that any separation in anything more than a mere separate days or separate weeks of our time is impossible.

I find so difficult understanding the argument which has been advanced by several of the representatives of the organizations that there would be some great injustice in dishonoring the members of these organizations or branding the members of these organizations with the declaration of criminality. I should have thought that if they were not already dishonored

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by the evidence that has been produced here, dishonor would be difficult to achieve by mere words of the declaration. It isn't we who are dishonoring the members of these organizations. It is the evidence in this case originating largely with these defendants that may well bring dishonor to the members of these organizations. But the very purpose of this organizational investigatin is to determine that part of German society which did actively participate in the promulgation of these offenses and that these elements may be condemned and, of course, if it carries some discredit with it, I think we must say that the discredit was not originated by any of our countries; the dishonor originated mainly in this dock together with those whom the fortunes of war have removed from our reach.

There seems to be some misunderstanding as to just what we mean or, at least, we do not agree as to what should be meant by treating these organizations as generally voluntary. The test which has been advanced by the counsel for the organizations would, it seems to me, completely nullify any practicable procedure. Now, let us contrast the Wehrmacht and the SS to get at which I mean regarding an organization as generally voluntary. The Wehrmacht was generally a conscript organization, but it may have had a good many volunteers in it. I do not think we would be justified because there were volunteers in calling the Wehrmacht a voluntaryorganization. The SS, on the other hand, was generally a voluntary organization but it did have some conscripts, and I do not think it would be any more just to carry the SS into the class of conscript organizations because of a few members than it would to classify the Wehrmacht as voluntary because of a few members. In other words, in neither case would we be justified in allowing what we might say the "tail to wag the dog". It is a question of the general character of the overall organization that decides what these organizations are.

Now, of course, if the Tribunal saw fit to say that its declaration was not intended to apply to any groups, sections, or individuals who were conscripts, that is one thing. I have no quarrel with that. From the very beginning I have insisted that, of course, we were not trying to reach conscripts. But, if you sit here week after week determining who is a conscript and just where that principle leads, that I think would be quite apart from which we ought to do here.

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Now, a great deal of argument is addressed to the fact that proof is lacking or that there should be stronger proof; that these organizations' real criminality was known to the members, and the inference seems to be that we must prove that every member, or, at least, that we cannot hold members who did not know this criminal program on the part of these organizations. I think this gets into a question, perhaps, of the sufficienc of proof rather than one of principle, but it seems to me again that we have the common sense division. If some one organized a literary society for the study of German literature and accumulated some funds and had a home, a house, and some of the defendants became its officers and secretly diverted its funds to criminal purposes, while all the time to the publicit was presenting only the appearance of being a literary society, it might very well be that a member should not be held unless we proved actual knowledge. Or, if a labor union, ostensibly, for the purpose of improving the welfare for its members, has its funds or properties or the prestige of its name diverted by those who happened to gain control of it to criminal purposes, then you have a situation where the members might not be chargable with knowledge. But when I speak of knowledge sufficient to charge members as I did, I do not mean the state of mind of each individual member. That would be an absurd test in any court of law. In the first place, it is never a satisfactory thing to explore a state of mind of an individual and, in the second place, it is impossible to explore the state of mind of an alien individual. So we might as well drop this thing from consideration, if that were to be the test.

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But let us look at this program overall. How did these few men who were the heads of the Nazi regime kill five million Jews, as they boast they did? Now, they didn't do it with their hands, and it took disciplined, organized, systematic, human manpower to do it. That manpower wasn't casually assembled. It was organized, directed and used.

Now, how can the killing of five million Jews in Europe be a secret? Weren't the concentration camps known in every one of our countries? Wasn't it a byword in every land in the world -- the German concentration camps -- and yet we have to hear that the German people themselves had no knowledge about it.

Our public officials were protesting the slaughter of Jews, diplomatically and in every other way, and yet we are told this was a secret in Germany. The name of the Gestapo was known throughout the world, and there isn't a man among counsel who wouldn't have turned white if in the night at his door someone rapped and said he was representing the Gestapo. The name of that organization was known--unless we are to assume that it was singularly secret in Germany but known to the rest of the world.

Now, that sort of thing bears on this question of what men ought to know who joined these organizations. There was no declared and ostensible purpose of the SA, the SS, and several of these organizations, except to carry into effect the Nazi program. They would make themselves masters of the streets.

The story is all in the evidence, and I won't go on to repeat it. The program was an open, notorious program, and these were the strong-arm organizations. So it seems to me that we get down to the situation where, as Chief Justice Taft once said to the Supreme Court of the United States on a somewhat similar question: "We as judges are not obliged to close our eyes to things that all other men can see." And this was notorious and open.

It is a little hard, if your Honors please, for an American patiently to listen to the arguments made here again and again that there is some plan here to punish with death penalties or extremely severe penalties people who innocently got caught in this web of organization. If there were the slightest purpose to go through Germany with death we wouldn't have bothered

to set up this Tribunal and stand here openly before the world with our evidence. We weren't out of ammunition when the surrender took place, and the physical power to execute anyone was present.

These powers have voluntarily, in their hour of victory, submitted to the judgment of this Tribunal the question of the criminality of these organizations. And it seems to me a little trying on the patience of representatives of those powers to be told that back of this is some purpose to wreak vengeance on innocent people. I think it is difficult for those who have survived this Nazi regime to understand how reluctant we are to kill any human being. It is a commentary on the stateof mind that survived this Nazi regime rather than upon us.

Now, Control Council Act Number 10--I don't know whether your Honors have copies of that. Control Council Act Number 10 does make membership in the categories which may be convicted a crime, and I think it ought to. It ought to be sufficient to bring before a Tribunal inquiring into the detail of each individual any individual who is a member, and that is all that we have here in a declaration, in substance, an indictment which enables you to put the individual on trial.

Now, it is true that the punishment may include a death penalty, and so long as the death penalty is imposed by any society for anything, the penalty of death ought to follow in some of these cases. The SS men who were responsible for the destruction of the Warsaw Ghetto, for example, or SS men who are shown to have been responsible for the top planning, even though they didn't actually participate.

But I would call your attention to the fact that in Provision Number 3 of Act Number 10, the slightest penalties are also provided. The restitution of property wrongfully acquired is one of the penalties that may be imposed. The deprivation of some or all civil rights is another. And during this period of reconstruction of German society, those minor penalties may very well be imposed upon people who entered into these organized plans. If not, you have the situation that the people who organized themselves to force this Nazi program, first on the German people and then on the world, are treated exactly the same as the German who was the victim of it.

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Now, isn't it our duty as occupying powers of a prostrate country to draw some distinction between those who organized to bring on this catastrophe and those who were passive and helpless in the face of overwhelming power?

Counsel for one of the defendants has already shown that in administering the affairs, an SA man has been made a councillor in one of the districts. There is no purpose, because a man happened to get into the SA, to take his life or to take his property or to condemn him to hard labor for life. There is a purpose to have the basis for bringing these people in for what the military people call a "screening" and find out what kind of people they are and what they have been up to.

This Control Council Act, while I am frank to say I would not have drafted it in the language it is drafted in, this Control Council leaves, in the first place, discretion as to whether prosecutions will take place in the hands of the occupying powers. I have no idea that the fears of counsel that millions--I haveforgotten how many millions it was estimated would be brought to trial. I know that the United States has worries enough over manpower to bring to trial 130,000, so we don't want to bring to trial millions. And it is for that reason that we have consented to the exclusion of some of these categories where it seemed we could exclude them very safely without jeopardizing the overall program of dealing with these people.

Now, I want to make clear why it is that we don't want to go into this trial to this question of each of thesemany sub-divisions of these Nazi organizations and the functions of each. You have heard some of them named. They are innumerable. Some of them existed a short time and then disappeared.

The tiral of each of these sub-divisions would take--I wouldn't venture to say how long. Now, we don't want to see this court trivialized. This isn't a police court. This wasn't set up to be a police court, and this is the police court function, after this Court has laid down the general principles, to take up the case of individuals or of many individuals and to determine whether they are within or without the definition.

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I don't know whether a mounted group of SS men are any less dangerous than an unmounted group. I had always associated the equestrian art with warfare, but I do know it will take a long time to determine it.

I don't know whether SS motorcycle mounted traffic officers are less dangerous than those who don't have motorcycles, or less criminal, but I should have a suspicion that the greater the mobility the more active the group was in carrying out these widespread offenses.

I don't know about the physicians. I don't think it is up to us to try it in this case, but I suspect that a medical morps meant there might be some casualties, and this thing isn't innocent on its face, as it appears. This will require a great deal of evidence if we go into each of these things, and it seems to me that it would be out of keeping with the character of this Tribunal to go into that kind of questions.

Now, it isn't necessary to go into the group any more than it is the individual, and if you go into the group I know of no reason why you shouldn't go into the individual; because if the group is within the general contour, each member of that group is entitled to his hearing before he is condemned. It may very well be that the occupying authorities will decide that the whole group isn't worth prosecuting. We have no illusions about this thing. We are never going to catch up with all the people who are guilty, let alone prosecuting the innocent. If they are prosecuted, however, it may very well be that the group would be treated together in some way so that there could be a single determination as to each group.

In any event, since each individual has to have a hearing, there can be no point inhaving a hearing for sub-groups, between the individualand the principal organization that we ask to have declared guilty.

If there was any reason, if we were to fully try this question and decide just who is in and who is out of the circle of guilt, there would be no reason why the Charter wouldn't have given you power to sentence. There would be no reason for further trials.

It seems to me that we must look at this matter somewhat in the light of an indictment. It is true it is an accusation against all members of the group. It has no effect unless it is followed by a trial and a conviction, any more than an indictment that is never followed by a trial would

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have effect. The effect of the declaration is that the occupying power may bring these individual members to trial. Administrative considerations wi ll enter into it, the degree of connection. It may very well be that it will be decided that those who weremere members and not of officer rank of any capacity should not be punished. We can't say just what will be necessary.

Frankly, I don't know just what man power is going to be available for the United States' part in the follow-up of these trials. There are difficulties which I don't underestimate, but I do know that the idea that this means a wholesale slaughter or a wholesale punishment of people in Germany is a figment of imagination and is not in accordance with either the spirit of this trial or the purpose of the Charter.

I think that is all that I care to say unless the Tribunal has some question, which I will be glad to answer.

THE PRESIDENT: Justice Jackson, there are one or two questions I should like to put up to you.

First of all, in your submission, do the words in Article 11 haveany bearing, the words at the end of Article 11, where it provides that "Such court" -- in the

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last three lines -- "may, after convicting him, impose upon him punishment independant of and additional to the punishment imposed by the Tribunal for participation in the criminal activity of such groups or organizations." Do the wrods "for participation in the criminal activity of such groups or organisations" add anything to the definition of the word "membership" in Article 10?

JUSTICE JACKSON: I do not think they add anything. Frankly, the wording of this ARticle has bothered me, as to just what it does mean, since no punishment is imposed by this Tribunal at all for participation in the activities of the group. The purpose of the language was to make clear that the punishment for an individual crime, if one committed a murder individually or was guilty of aggressive warfare planning, is not to interfere with the punishment for being a member of a criminal organization or vice versa, to make clear that they are not mutually exclusive. But the language I am not proud of.

THE PRESIDENT: Secondly, would an individual who was being tried before a National Court be heard on the question whether, in fact, he knew of the criminal object of the group?

JUSTICE JACKSON: Well, I think he would be heard on that subject, but I don't think it would be what we in the United States would call a complete defense. It would perhaps be a partial defense or mitigation. I should think that the Tribunal might well, the court trying it, might well have felt that he should have known under the circumstances what his organization was, despite his denial that he did not; and that his denial, if believed, would weigh in mitigation rather than in complete defense. In other words, I do not believe that you can make as a decisive criterion of guilt the state of mind of one of these members where you have no power whatever, no ability whatever, to controvert his statement of that state of mind. I think you have to have some more objective test than his mere declaration.

THE PRESIDENT: Then I understood you to say that it wasn't for the Tribunal to limit or define the groups which were to be declared criminal, but as the Charter does not define them, isn't it necessary for the Tribunal to define what the group is?

JUSTICE JACKSON: I think it is necessary for the Tribunal to identify the group which it is condemning sufficiently so that it would afford a basis for

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bringing the members to trial for membership. I don't think it is necessary to define the exact contours of guilt. It is defined in reference to membership rather than in terms of guilt or innocence. That is to say, it may be that there is some little section of the SS that on trial would be said to be not guilty of participating in the crimes of the organization. I don't think it is up to this Tribunal to take evidence, because if you take evidence as to some you must as to all.

The SS is a well known organization. Its contour is easily defined by membership, and within those contours it doesn't seem to me necessary to make exceptions.

THE PRESIDENT: But if there were to be an essential distinction on the question of criminality between the main body of the SS and, for instance, the Waffen SS, would it not be the duty of the Tribunal to make that distinction?

JUSTICE JACKSON: I do not think that would be necessary. I think when the member was brought to trial -- one may be a conscript and still have remained in on a voluntary basis, or he may have gone beyond his duty as a conscript. I don't think it is necessary at this stage of the proceeding, where the individual is not here, to eliminate him. I do think that the principle that acts performed under conscription are not within the condemnation of the Tribunal is quite a different thing.

THE PRESIDENT: Is it possible for this Tribunal to limit the powers of the National Courts under Article 10 by defining either the group or giving a definition of the word "membership".

JUSTICE JACKSON: Well, if your Honor please, I think every Tribunal in its judgment has a right to include in its judgment provisions which will prevent its abuse. I don't think this Tribunal is lacking in power to protect its decision against distortion or abuse. I take it that is the question rather than the question, if the National Courts brought these persons to trial and paid no attention to the declaration, I don't suppose that there would be any power in this Tribunal to stop them from doing it. But I assume you mean as a consequence of this declaration, and I think that the declaration can be circumscribed or limited. I certainly would insist that the Court had inherent power to protect its judgement against abuse.

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THE PRESIDENT: Do you think this Court could direct the National Court to take any particular defenses into consideration?

JUSTICE JACKSON: I don't know that it could put it in just that way, but I suppose it could define the categories in a way that the declaration would not reach any except those included within it. In other words, I think the declaration that this Tribunal will make is within this Tribunal's control. When you get away from the declaration, I think you would have no control over the Courts. But insofar as they relied on the declaration you would have power to control the effect of the declaration, provided the effect was not inconsistent with the provisions of the Charter.

THE PRESIDENT: You did, I think, make some suggestions for obtaining such evidence as you thought was necessary. Do you wish to add anything to that?

JUSTICE JACKSON: I have nothing to add to that, your Lordship. I realize that the defendants' counsel have great difficulty in getting evidence, great difficulty in communication. I have it myself, great difficulty in getting letters delivered, great difficulty in all of these things. But I will state to this Tribunal categorically -- I don't know to what camp it was referred to yesterday as substantially refusing counsel's application to see their clients -- but so far as the American zone is concerned, counsel, if they are properly cleared to go there, will be given every facility to get every kind of evidence that is available in that camp. If they are there at mealtimes they will be fed, and if they are there at night they will be sheltered. We will put everything in their way to help them that is possible.

Of course there are security problems involved, and counsel can't just walk in a camp and make himself at home. He will have to be cleared in advance so that they meet the security requirements; but there is no purpose to obstruct, and there is every purpose to assist.

THE PRESIDENT: Thank you.

THE TRIBUNAL (Mr. Biddle): Mr. Justice Jackson, I'd like to ask you a few questions. Some of them will be somewhat repetitious of what the President has already said. You will excuse me if I request one or two of those. Most of them are directed for the purpose of this argument, which I take it is to form some kind of definition of the organization, which may of course not be final

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but will at least give us a view of what should be relevant to the defendants making up their cases. So the questions are addressed to that rather than any ultimate theory of definition.

You said that you would suggest excluding clerks, steographers, and janitors in the Gestapo. Well, now, if we accepted that, would we not be obliged to exclude such categories from other criminal organizations?

JUSTICE JACKSON: Not at all, I think, your Honor. I think there is a difference between a concession by the Prosecution and either the necessity for the Court making a decision or a decision by the Tribunal.

It might appear logically that if we conceded clerks, stenographers and janitors of the Gestapo were not to be included, that no clerks, stenographers or janitors should be included. It doesn't follow. The relationship in different organizations differ.

From what we know about the Gestapo situation, we are satisfied that clerks, stenographers and janitors in that organization ought not to be included, and we don't want to waste any time on it.

MR. BIDDLE: What is the reason for that, that those clerks would not have had knowledge of what is going on in the Gestapo?

JUSTICE JACKSON: I don't think they either had sufficient knowledge, in general, to be held, now that that they had sufficient power to do anything about it if they did.

Now, this question of dealing with minor people -- and it is one of the questions that the Court inevitably gets into if it undertakes to draw these lines itself rather than letting them be drawn administratively by what we choose to prosecute -- is just illustrated by this sort of thing.

One of the difficulties with the Court is that it tries to be logical, and ought to be logical perhaps. I have always thought that was the great merit of the jury system; that juries don't have to be, and in prosecuting we don't have to be. It may look illogical to exempt small people in one organization and not in another, but there were differences in them.

I think it is in evidence -- if not, it will be -- it was pointed out at one meeting by the Defendant Goering that chauffeurs to certain officers had profitted to the extent of half a million Reichsmarks out of Jewish property

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that they had gotten their hands on.

Now, I suppose ordinarily you'd say that a chauffeur for an official was not a man who had much discretion and not a man who was expected to know much about what his employer was doing, but you have a great deal of difference in their relations to these men.

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So far as I am concerned, I want to state it further -- and I think it will be assumed -- the United States isn't interested in coming over here 3500 miles to prosecute clerks and stenographers and janitors. That isn't the class of crime, even if they did have some knowledge, that we are after, because that isn't the class of offending that affects the peace of the world. I think there is little reason to fear that that sort of person -- unless there is some reason to feel that they have some guilty connection beyond merely performing routine tasks -- will be prosecuted as a bigger problem as we have on hand here.

THE TRIBUNAL (Mr. Biddle): But in spite of that, you would include them in the Einsatz, let us say?

MR. JUSTICE JACKSON: I would not exclude them.

MR. BIDDLE: I take it, you would include them.

MR. JUSTICE JACKSON: If they were members, they would be included; if they were merely --

MR. BIDDLE: Yes.

MR. JUSTICE JACKSON: If they were merely employees, that is something different; but if they took the oath and became a part of the SS organization, I think they stand in a different relation to the employed clerks of the government agency.

MR. BIDDLE: Now, somewhat along these same lines, you stated, in trying to define what a criminal organization was, that its membership must have been -- I am quoting your words -- "generally voluntary" and its criminal purpose or methods open and notorious and of such character that its memberships in general may properly be charged with knowledge of them.

Now, I am going to ask you a question which is somewhat repetitious of what the President asked you; but perhaps to specify a little more, would it not be inconsistent with that test which you suggest for criminality, if we decline to consider whether any substantial segment of the organization -- I mean a section or segment might comprise a third of the whole organization or even more, like the Waffen SS within the General SS, was either conscripted, which is one test, or ignorant of the criminal purpose, because if such a

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a substantial segment could be shown to be innocent under these tests, would not it be necessary either to decline a declaration on that ground, that the criterion -- that the criteria were not generally satisfied as to the accused organization or else exclude the innocent segments from the deposition of the criminal organization?

Now, that is rather a involved question but it seems to me that if the test is the knowledge or assumed knowledge, that a very large segment did not and probably could not have had knowledge that would be relevant not only for the purposes of evidence but for the purposes of definition?

MR. MUSTICE JACKSON: Well, I think you have at least two ideas in the question of what must be dealt with separately. The first is conscripti and knowledge, to my way of thinking, presents a very different problem.

As to conscription, as I said before, I think, if the Tribunal saw fit to condition its judgment not to apply to conscripted members of any organization, I shall have no quarrel with it. I have always conceded, we didn't seek to reach conscripted men -- if the overwhelming power of the State puts them in that position, I don't think we should pursue them for it.

If the Tribunal says that the Waffen SS must be excluded because it was conscripted, that raises a question of fact.

MR. BIDDLE: Yes.

MR. JUSTICE JACKSON: And it raises a question of fact that we would be three weeks trying, and that is what I want to avoid, because there were Waffen SS's and other Waffen SS's, and there were different periods of time, and there were different conditions; and we get into a great deal of difficulty if we undertake to apply the principle that the conscript is not to be punished; and that, it seems to me, is what is properly left to the future course, the question as to whether an individual or a number of individuals come within that principle; in other words, I think this Court should lay down principles and not undertake what I call "police court administration" of those principles as applied to individuals.

MR. BIDDLE: May I interrupt you for a moment on the first point? I take it, then, that you would think it appropriate to express a general limitation with respect to conscription in the declaration but not to designate to whom that applies?

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MR. JUSTICE JACKSON: I would have no objection to such a designation as far as I am concerned. Now, the other question is a question of knowledge this is infinitely more difficult. We don't want to set up a trap for innocent people. We are not so hard up for somebody to try so that we have to seek and to catch people who had no criminal purpose in their hearts; but there can be no doubt that every person affiliated with this movement at any point knew that it was aimed at war and aggressive war. There can be no doubt that they knew that these formations under the Nazi Party were maintaining concentration camps to beat down the political opposition and to imprison Jews, and the terrible things that were going on in these camps.

To ask us to prove individual knowledge or to ask us to accept the man's own statement of his state of mind is to say that there can be no conviction, of course. It seems to me that the scale of this crime and the universality of it, going on all over Germany, concentration camps dotting the landscape and the vast population, is sufficient to charge with knowledge that the principal organizations of the Nazi Party were responsible for those things. The test that I think which applies as to knowledge is not what some member now on the witness stand may say, that he knew or didn't know, but what in the light of the conditions of the times ought to have known what he is chargeable with.

MR. BIDDLE: Wouldn't it follow from that, that there was no taking of any evidence on what was generally known?

MR. JUSTICE JACKSON: Well, I think the proof of what was going on establishes the point as to chargeability with knowledge.

MR. BIDDLE: Do you claim that the defendants should not be permitted to give any evidence as to what was generally known with respect to what was going on?

MR. JUSTICE JACKSON: To what was generally known, I don't think the defendant's denial that he knew what was going on has any materiality.

MR. BIDDLE: That wans't my question. My question was, whether a witness could be permitted to testify that the acts of the particular organizations were not generally known to its members. Would you exclude

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that evidence?

MR. JUSTICE JACKSON: Well, I would, I would, I certainly would, and if I heard it I wouldn't believe it; but perhaps my —

MR. BIDDLE: Excuse me. Although on your test of knowledge, you wouldn't permit the defendants to meet that test?

MR. JUSTICE JACKSON: I should say that that is just exactly the situation, that the Court would take judicial notice from the evidence that is in, that this was a thing that must have been known in Germany, and I would not think that it would be permissible for a citizen of the United States to testify that he didn't know the United States was at war, a fact of which he is chargeable with knowledge, and it seems to me that the magnitude of these things is so established and the repeated daily connection between the organizations of this criminal program is so clear.

THE PRESIDENT: The German translation doesn't seem to be coming through.

MR. JUSTICE JACKSON: I am sorry.

MR. BIDDLE: Did you finish? Mr. Jackson, I only have two or three more questions. One is directed to the General Staff. Does the particular date when an individual accused -- I beg your pardon -- when an individual assumed one of the commands, listed in Appendix B of the Indictment, have any bearing on whether he is a member of the organization? Now, I am going to bring that question down to the General Staff.

MR. JUSTICE JACKSON: Perhaps I would warn you of this. I am not a military man. I have not specialized on that subject and I shall want to refer your question to someone whose knowledge is more reliable than mine.

MR. BIDDLE: I shall ask the question directed to you as a lawyer and not an expert in military matters. Assume that one of these individuals became an army group commander after the wars of aggression had been planned, proposed, initiated, roughly, that would be after 1942, let us say, after Pearl Harbor, and had reached the stage when German was on the defensive, is his acceptance of a command at that date sufficient to make him a member of

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the organization?

MR. JUSTICE JACKSON: I should think it would.

MR. BIDDLE: The reason I asked you that, Mr. Jackson, is that I thought you had rather indicated in your opening address that the starting of the war was the essence of the crime rather than the waging of war, and I was wondering whether in that case there would be any difference which we should consider?

MR. JUSTICE JACKSON: Well, I think when one joins, he ratifies what has gone before and it would seem to me that when he came into the picture at that point, it was a ratification of all that had gone before on the ordinary principles of conspiracy.

Now, I think it is a difficult question, whether a man had not had any prior connection with the Nazi Party. If you take the example of a man who disapproved all that the Nazi Party had done, who never became a member of it, who stood out against it, and publicly his position was clear, and he took no part in the way until the day his country was being invaded and he said "I don't care what happened before; my country is being invaded and I shall now go to its defense", I would have difficulty convicting that man. I don't know such a man.

MR. BIDDLE: Mr. Jackson, there is only one more question I should like to address to Law No. 10. I am a little puzzled myself on Law No. 10, the Control Council Law of December 20. I think that was the date. You spoke of one reason for declaring the organizations criminal, and bringing persons into the Control Council for screening. I take it, they can do that easily without any help on our part.

MR. JUSTICE JACKSON: That is right.

MR. BIDDLE: Now, you said something very interesting. You said the Act would not have been so if you would have drafted it. How would you have drafted it, if that is not a proper question?

MR. JUSTICE JACKSON: Well, I think I would not have made these penalties of this Act apply to all of the crimes. You have one lumping of a whole list

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of crimes which, to my mind, range from the very serious to the very minor. Then you have applicable to all of these penalties from death down to deprivation of the right to vote in the next election.

MR. BIDDLE: And you would not have made the death penalty to the members of the SA who resigned in 1922?

MR. JUSTICE JACKSON: No, I would not have, and I think in that way I would have been more exclusive.

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I would be more explicit with the penalties, like the Mikado, I would like to try to make the penalty or the punishment fit the crime, rather than leave it wide open.

THE TRIBUNAL (Mr. Biddle): Mr. Jackson, what defenses do you think are permitted under the Control Counsel Law? We have to assume that the members of the Tribunal will permit certain defenses of any defense expressly permitted.

JUSTICE JACKSON: No, no defenses expressly permitted. I take it any defense which goes to the genuineness of the membership is at the volition of the individual; duress, fraud - and by duress I mean the legal definition of duress - I don't think that the fact that he has had good business, and the fact that man is to contend that the customers may leave him if he does not join the party, that is not duress, or anything that goes to the genuineness of his membership.

MR. BIDDLE: One more question. If the Tribunal were of the view that a declaration of criminality of the organization is an essential legislative matter, as suggested by some of the defense lawyers, rather than a judicial one; if we were of that view, would it be appropriate for the Tribunal to consider the legislative authority of the Control Counsel to make such a declaration, which undoubtedly they could do in exercising that discretion, which is conferred on us under Article 9 of the Charter?

JUSTICE JACKSON: I would not think so, Your Honor. I think that this Tribunal was constituted by the power to determine, and for the purposes of determining on the record such facts after hearing of the evidence, and, after knowing the facts, determining what organizations were of such a character that the members ought to be put to trial for such membership.

The fact that some other group does not have a hearing process, and it is not constituted as this might be, either administratively or some other way, to reach that same result, I don't think this is proper consideration. Of course, you could punish these members without anything. We have them in our power and in our camps. But the Governments have decided they want themselves to decide any issues after a full consideration of the record, and, in this matter I think that --

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MR. BIDDLE: But you have no doubt of the power of the Control Counsel to do it, irrespective of what they do to you.

JUSTICE JACKSON: I don't know of any limitations on the power of the Control Counsel. There is no constitution. It is a case of the victor and the vanquished, and I think that is one reason why, however, we should be very careful to observe the request of our nation to proceed in this way. We are in the position where there is no restraint in the power except from physical power, and mighty little of that today. They are voluntarily submitted to this process of trial and hearing, and it seems to me that nothing should be done by us as members of the legal profession to discredit that process, or to avoid it.

MR. BIDDLE: That is all the questions I have to ask.

THE TRIBUNAL (M. de VaBres): I would like to ask Mr. Jackson a few details on the consequences of a declaration of criminality of an organization. Suppose that you belonged to one of the organizations classified as criminal, for instance, a SS, or a member of the Gestapo, is brought before the jurisdiction - the military jurisdiction of an occupying authority. In consequence of what has been said so far, he might be able to justify himself by proving that his membership in the group was a false membership. He was not a volunteer; if I understood correctly, he would also be able to justify himself by establishing that he never knew of the criminal capacitie of the association. That fact is, at least, the interpretation which has been consecrated by our ministry, and which we consider exact; however better to suppose that the Court just being considered at the moment is a different nation. I suppose that it designates from the condemnation that the individual himself was a member of the criminal organization, or, which is now a bigotry organization, and that an automatic condemnation definitely does less, is that the interpretation which has been defined by Mr. Jackson. This interpretation is written in no text, and does not find itself in the statute. In consequence of which by virtue of what text would the Tribunal, itself being considered, be obliged to conform to the interpretation?

JUSTICE JACKSON: The control of the future Tribunal is the control of the

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effect of the declaration on this Tribunal. This Tribunal's effect when brought before a subsequent tribunal is defined by the Charter, and this is only the effect that the issue has as to whether the organization as is criminal cannot be retried. That there would be no such thing as automatic condemnation, because the authority given in the Charter is to bring a person to trial for a membership. It would, of course, be incumbent on the prosecutio on an ordinary principle of jurisprudence to prove membership. I think proof that one had joined would be sufficient to discharge that burden, but then the question might be raised by the defense that he had defenses, such as duress, force against his person, such threats of force would be raisable, and would have to be tried, but the Charter does authorize any use of the declaration by this Tribunal except as a basis for bringing the members to trial.

M. de Vabres: I understand well this authority of the Military Court of the International Tribunal which would be imposed in the particular jurisdiction of the States, and oblige them to consecrate the interpretation it would have to consider. But in that case in concluding with your thought, Mr. Jackson, the judgment of the International Military Tribunal, the judgment which we will deliver, will have to contain some precise definition on this topic. Mr. Jackson said, however, a few moments ago, and I am in agreement with Mr. Biddle, that the statute permits us to define a criminal organization. That would be in our opinion not only a determination of the group which we consider criminal, but also a definition of a criminal organization, and from that in some manner there would be a precise definition concerning the cases of responsibility of false membership, and precise definition which the particular court of the States would be forced to respect. Do I understand Mr. Jackson's thought correctly.

In that case the question which I ask is the following: and is similar to that of Mr. Biddle: It is not always granted to consider our judgment a certain legislative character. We are not an ordinary court since we are consecrated to give a decision, such as a decision of a criminal organization, which generally includes this law, and at the same to use a

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decision which contains a disposition that limits the cases for individual responsibility. That is to say in brief we are to a certain extent legislative as indeed we so heard from you yesterday.

JUSTICE JACKSON: This is something in the nature of legislative, but under the nature of the Indictment you may treat either analogy, and I don't see anything about that, if I understand it, which is a complicated problem. In the United States we have a strict separation of legislative from the judicial power, and nothing in that power which controls this Tribunal, and whether you treat the analogy, as to the Indictment, which you be accusing by your finding in your declaration, or, whether you treat the analogy as legislative, it would be in all sense of the word as an act of the four powers, since they are not required to withhold any power from the Tribunal.

M. de Vabres: Yes, yes.

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THE TRIBUNAL (M. DeVabres): Yes. The question which I have just asked seems to have only theoretical interest. This is, however, the practical consequence which I would be tempted to consider, and on which I would like to hear your opinion:

If we have some legislative power, in that we are able to limit the incrimination and admit causes of responsibility or excuses, does this absolutely exclude our limiting at the same time the punishment. Earlier, Mr. Biddle and Mr. Jackson were considering Article 10, and Mr. Jackson expressed some criticism concerning the sanctions, which are not individual sanctions, since they can extend as far as the death penalty.

There are some crimes for which death seems justified, such as crimes against humanity. But isn't it too much, if we consider the manner of a crime, which in France would be considered purely material, such as the crime of belonging to a criminal organization--would it not be too much for us to foresee the death penalty, and in that case the International Military Tribunal might be forced to reduce to some extent the notion of a criminal organization, merely because we consider the possibility of this penalty being too severe? Does this include our being able to formulate a penalty, or at least a maximum penalty, which might be applied for the crime of belonging to a criminal organization?

MR. JUSTICE JACKSON: I should not think that it was within the proper sphere of the Tribunal to deal with the question of penalties, for the reason that no power to sentence anyone is given to this Tribunal other than the Defendants on trial; I mean, no power to sentence for membership in the organizations. Therefore, I think no incidental power to control penalties is given, but the power to declare an organization criminal does, incidentally confer power to determine what that organization is, and I have not been disposed to question the power of the Tribunal to carry that definition to great detail, although I would question the wisdom of it.

The power, however, of sentence for membership is not even remotely

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conferred upon the Tribunal, and I would think that that would be a rather drastic expansion of its powers.

THE TRIBUNAL (M. DeVabres): I would like to thank Mr. Jackson for his answers to my questions.

THE PRESIDENT: We will adjourn for ten minutes.

(A recess was taken.)

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(Sir David Maxwell-Fyfe approached the lectern).

THE PRESIDENT: Did you want to add a reply or did you come in order that we might ask you some questions?

SIR DAVID MAXWELL*FYFE: First, if the Tribunal will allow me, there are three or four points on which I should like to add a word.

The first point that Dr. Kubuschok made was that the procedure of asking for a declaration against the Organizations was objectionable for two reasons: 1, because if was founded on the limited phenomenon in Anglo-Saxon jurisprudence that a corporation may be convicted in certain limited spheres; and secondly, that the Organizations were in fact dissolved some time ago.

I think it is important to stress that that is not the legal conception, which underlies this portion of the Charter. It is really based, in my submission, on a doctrine found in most systems of law, either res adjudicata or the concept of the judgment in rem as opposed to the judgment in personam. That is, that it is in the general and public interest that litigation on a particular point should not be interminable, and that if the apporpriate Tribunal has come to a decision on a point of general interest and importance, that point should not htereafter be litigated many times.

It is the essential view of the Prosecution here that this Tribunal, having had the advantage of evidence dealing with the whole period and functioning of the Nazi conspiracy, is the appropriate and indeed the only suitable tribunal for deciding the question of criminality. It is a prospect which would be quite impracticable and beggars the imagination as to time, to consider that every military government or military court should decide one after the other the question of criminality of great organizations like these. And therefore we have in the Charter adopted the procedure that that preliminary question will be decided once and for all by this Tribunal.

The fact that the Organizations have been administratively dissolved is irrelevant. What is important is, what was the nature of the Organizations when they did function? And that is the issue which the Tribunal has to determine. We submit that it is a clear implication, if not indeed expressly within the wrods of Article Nine, that it must be at the brow of the individual defendants that the question of this criminality should be decided, and we say that

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apart from considerations of practicality that the wording of Article Nine is a clear guide against separation of these issues as suggested by two or three of the Defense Counsel.

I only want to add one word which has been said on the discussion of Law No. 10. Dr. Kubuschok made the point that this procedure really acted entirely against the individual. There are at least two answers. The first I have endeavored to give as to the legal concept behind the idea of a declaration; second, the one which has been canvassed before the Tribunal, as to the rights of Defense. May I say that, in my submission, membership in a organization is a question of fact and therefore these decenses of duress, fraud or mistake -- to take three examples -- must clearly be permissible and good defenses on that question of fact. The third is that every document such as the Charter -- the same would apply to every piece of legislation -- contemplates intelligent and reasonable administration in carrying out its requirements, and it would be, in my submission, idle to take the view that where you have a permissive enactment like Law No. 10 -- and it is clearly permissive as to prosecution -- that intelligent administration should prosecute every one who could be prosecuted under the Act.

In our candid judgment, hard cases make bad law, and it would be wrong -- in my submission -- to decide or interpret on an extremely unlikely hard case.

I want, if I may, to say just one or two words on the argument so interestingly put forward by Dr. Servatius and mentioned a few moments ago by the learned French Judge.

In my submission there is no legislative function for this Tribunal whatsoever. There is a clearly judicial function, and I want to make it clear: I do not qualify it by "quasi-judicial" or any qualification at all. It is a simple judicial duty. The first portion of that duty is to define what is criminal. In my submission, as Jr. Justice Jacson argued yesterday, that presents no difficulties. It occurs in Article Nine, three articles after Article Six, and "criminal" in that context means an organization whose aims, objects, methods or activities involved the committing of the crimes set out in Article Six.

When criminal has been defined, it is a matter of judicial weighing of evidence to decide whether there is evidence of these crimes committed by the organization or being the aim or object of the organization as I have stated. But I respectfully ask the Tribunal to hesitate long before it accepts the argument of Dr. Servatius that this Tribunal should decide the interpretation of criminal on its own a priori basis, to use Dr. Servatius' own words, of politics and ethics. That would be introducing a new, dangerous, and unchartered factor into the trial. There is, in my submission, a clear line of guidance for the judicial approach, and nothing in the Charter to support the prima facie unexpected idea that it should delegate to itself legislative powers.

Again, if I may add just one word as to the conclusions which Dr. Kubuschok drew on the question of criminality as a ground for deciding the relevance of evidence, his first conclusion was that the organization in question, according to its constitution or charter, did or did not have a criminal aim or purpose.

I accept, of course, the test of aim and purpose, but I do not accept the limitation to charter or constitution. The criminal aim or purpose may be shown by the declarations or publications of the leaders of the organization, and also, as I submitted, by the course of conduct in method and action. I agree with Dr. Kubuschok that aim or purpose is the first test, but I do not agree with his limitation as to gathering it.

His second point was that crimes under Article 6 were not committed within or in connection with the organization or were not committed continuously over a period. The first part of that would seem fairly clear, that if the crimes were not committed within or in connection with the organization, the organization is obviously not in a very favorable position. But I first answer the second part by saying that it does not come into the picture of this case that there is any instance of isolated crimes with regard to every organization. The crimes alleged are, in fact, spread over the period alleged in the indictment, but I suggest that the adoption of such a criterion does not really help. One comes back to the first point of Dr. Kubuschok, that aims or purposes as disclosed by declarations, methods, or activities, is the primary and most important test.

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The, the third point that Dr. Kubuschok makes is that an appreciable number of members had no knowledge of the criminal aims or of the continuous commission of crimes. I endeavored to stress, as did Mr. Justiced Jackson, that the Prosecution's test is constructive knowledge. That is: Ought a reasonable person in the position of a member to have known of these crimes? And that really is the answer, in my respectful submission, to the relevance of individual knowledge of one particular member.

It is only too true that during the period under discussion a very large number of people made a habit of sticking their heads in the sand and endeavoring to abstain from acquiring knowledge of things that were unpleasant. In my respectful submission, that sort of conduct on the part of a member wouldn't help him at all, and the only answer to that is to adopt the test which we have suggested: Ought a person in that position reasonably to have known of the commission of the crimes?

Dr. Kubuschok's fourth point is that an appreciable number of members or certain independent groups joined the organization under compulsion or illusion or superior orders. Shortly we answer that by saying that that is only relevant to the defense of an individual member in the subsequent proceedings, and, of course, it is only a defense where he can show that he has taken no personal part in the criminal acts.

Then, the last point which Dr. Kubuschok made was that an appreciable number of members were honorary members. Again we say that that is only relevant to the defense of the individual member, and it does not really alter or increase the defenses open to him.

The only other point of Dr. Kubuschok's which I do think requires mention is that in considering how evidence could be presented, he said that certain rights of defense are universal. The first of these which he claimed was direct oral testimony, and he said that each individual defendant should have this right. He then admitted that that was practically impossible and suggested as a solution that we must typify, that is, that representatives of groups in the various camps should make affidavits showing what percentage took part in criminal actions or knew about them.

I want to point out to the Tribunal that it is expressly laid down in

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the Charter that members of the organization are entitled to apply to the Tribunal for leave to be heard, but the Tribunal shall have power to allow or reject the application. As a point of construction no less than of sense, there would have been no point in giving the Tribunal the power to reject the application if it were implicit that everyone should have the right to be heard.

The answer is that the Tribunal has a complete discretion to decide what line and what course shall be taken to procure the evidence. The Prosecution, through Mr. Justice Jackson, has indicated that it makes no objection to any reasonable form of collecting relevant evidence. What the Prosecution objects to is evidence being tendered on the issue before the Tribunal which is only relevant to the question of individual innocence or guilt of the member.

My Lord, I could have dealt, and indeed was prepared to deal, with a number of points raised by the other counsel for the defense. I hope they won't think that it is any disrespect to their arguments that I have not dealt with them, but I know that the Tribunal wishes to ask certain questions, and I don't want to trespass on that time. I only want to deal with one point because it kills two birds with one stone that have been flown against our argument in this case.

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It will be remembered that when I dealt with the SA yesterday, Dr. Seidl -- and I am sorry he is not here -- raised the question that the defendant Frank was not a member of the SA; and Dr. Loeffler, in dealing with the SA today, raised the question that its activities no doubt did not really extend after 1939, and not importantly after the purge in 1934.

I find an interesting quotation from the semi-official publication, Das Archiv, for April 1942, and as it is very short and deals with these point I venture to read it to the Tribunal so that it may appear on the record. At page 54 it says:

"SA Unit, General Government.

"At the order of the Chief of Staff of the SA, there took place the foundation of the SA Unit, General Government, whose command General Governor SA Obergruppenfuehrer Dr. Frank took over."

I only quote that to finish my argument to show, as indeed all the evidence shows, that with regard to the SA, no less than any other of the organizations, the prosecution have provided evidence of crimes reaching over the period which they have stated.

I deliberately have nut out anything further that I might say, My Lord, because I don't want to shorten unduly the time, if the Tribunal wishes to ask me any questions.

THE PRESIDENT: I think there is only one question that I should like to ask you. As I understand it, you say that the prosecution have proved facts from which one must conclude that every reasonable person who joined any of these organizations would know that they were criminal.

SIR DAVID MAXWELL-FYFE: Yes.

THE PRESIDENT: You would agree, would you not, that proof of any fact which went to contradict the facts from which you have presumed knowledge of criminality could be proved by the defense?

SIR DAVID MAXWELL-FYFE: Certainly. If the defense wought to prove, to take an extreme example, that the conduct of the SS with regard to, first of all, concentration camps, and secondly, killing Jews and political commissars on the Russian front, despite the vast territory over which these crimes have

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been proved to have been carried on, was done in such a way that nobody knew about it -- if there was relevant evidence on that point, then they could call it, on the general point that it wasn't a matter of imparted constructive knowledge, but of memory.

THE PRESIDENT: I only asked you that question because there were certain observations of Mr. Justice Jackson which did not seem altogether to accord with the answer which you have just given.

SIR DAVID MAXWELL-FYFE: I think that as I understood Mr. Justice Jackson, he was saying that it might not be relevant to prove that one member did not know of the crimes, and I thought that our two approaches really did fit in with each other.

THE PRESIDENT: Yes.

THE TRIBUNAL (Judge Biddle): I take it then, Sir David, that you would say that evidence with respect to general knowledge by any very substantial segment of an organization would be relevant, would it not?

SIR DAVID MAXWELL-FYFE: Well, it would be relevant if it were not absurd. I mean, a dis claimer of knowledge of certain acts may be so absurd that the Tribunal should not take the time of inquiring into it.

THE TRIBUNAL (Judge Biddle): But my point was this. You have said that evidence with respect to general knowledge over a whole organization would clearly be relevant.

SIR DAVID MAXWELL-FYFE: Yes.

THE TRIBUNAL (Judge Biddle): And now I ask you whether that would not be true with respect to any substantial segment of an organization such as the Waffen SS.

SIR DAVID MAXWELL-FYFE: I am trying to relate it to the practical position. That is where I find it very difficult.

Now to take your example, it is difficult to imagine -- let's take four divisions that were very well known: The Totenkopf, the Polizei, Das Reich, or the 12th Panzer Division. I should have thought that, as a matter of discretion, if it were sought to show that these divisions, about which there is so much evidence as to their participation in crime, did not know of the

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crimes, the Tribunal would be right in rejecting that.

THE TRIBUNAL (Judge Biddle): Well, the question would come up more whether the acts of the members of certain divisions were know generally throughout the whole Waffen SS, would it not?

SIR DAVID MAXWELL-FYFE: With the greatest respect, I find it very difficult to see how the knowledge or absence of knowledge of a particular division in the Waffen SS could affect the question of criminality of the SS as a whole.

THE TRIBUNAL (Judge Biddle): Well again, I am not asking you as to knowledge in a particular division; I am asking you as to general knowledge, throughout the entire Waffen SS, of the acts of a particular unit.

SIR DAVID MAXWELL-FYFE: Well, if some one is prepared to say, "I knew every division of the Waffen SS, and in my opinion no one in the Waffen SS had any knowledge or had any opportunity of knowing of the crimes", then the evidence would be admissible. Its weight would be so negligible that I should submit it would not detain the Tribunal long.

But I concede that if some one is prepared, laying the proper ground for his evidence, to say "I can speak; I

H0073 - 0075

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have the ground and the opportunity of speaking on the general position", then I don't see how the Tribunal could exclude it.

THE TRIBUNAL (Judge Biddle): The matter is very practical because we have to advise counsel for the defendants what material they can introduce, and do that very soon.

SIR DAVID MAXWELL-FYFE: Certainly.

THE TRIBUNAL (Judge Biddle): Now let me ask you a few other questions.

On what basis, Sir David, do you contend that the Reich Cabinet was a criminal organization as of January 30, 1933, when, if I remember correctly, there were only three members of the Nazi Party who were in the Cabinet: Goering, Hitler, and Frick. Do you think that if three out of a very much larger number, some twenty odd, could be said to be part of a criminal organization, that that makes the entire Cabinet criminal?

SIR DAVID MAXWELL-FYFE: Certainly, on thefacts. It must be remembered that Hitler had refused to take office as Vice Chancellor during the months before that, before the date that you put to me. He had refused on the ground that as Vice Chancellor he would not be in a position to carry out his Party program. On that basis the defendant von Papen and Hitler negotiated, and Hitler came into power on the 30th of January.

It is the case for the prosecution that those who formed part of that Cabinet knew that they were forming part of a cabinet in which Hitler was going to work out his program, as has been declared on so many occasions. That is the first point.

Secondly, it is the case for the prosecution that the defendant von Papen did join in introducing the Nazi conspirators into the Government with thatknowledge and with the purpose of letting them have their way in Germany.

The same must go,--it hasn't been investigated to the same extent, because they are not defendants, but the industrialists and the Party were acting with them in the Reich Cabinet. They must be taken to have known, just as Gustav Krupp knew and supported, just as Kurt von Schroeder knew and supported the aims of the Nazis whom they introduced and cooperated with in the government.

Thirdly, the personalities of the Nazis in the government--Hitler, and the defendant Goering, Frick, and Dr. Goebbels, whom I think became

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Propaganda Minister either at the same time or very shortly afterwards-- show that these people, they have shown it by their acts, were not persons to take second place. They introduced at once the Fuehrerprinzip into operation in the States, and these otherpeople in the Cabinet at that time accepted the Fuehrerprinzip and united in placing Hitler and the Defendant Goering, and the other conspirators, in the position of power and authority which enabled them to carry out their monstrous crimes that are charged against them.

I will give you one other reference.

It was within a few months of that period that the defendant Schacht became Plenipotentiary for War Economy and began the preparation for the economic side of the creation of Germany's war potential.

For all these reasons I submit that the Reich Cabinet at that date was deliberately -- and the same applies to the defendant von Neurath. It is the whole case of the prosecution, as to the case against von Neurath, that he sold his respectability and reputation to the Nazis in order to help them buy with that reputation and respectability, a position of power in Germany, with the conservative circles in Germany, and with the diplomatic circles in Europe with whom he came in touch.

For all these reasons, Your Honor, I submit that the Reich Cabinet at that time was so totally effected with the criminality which we suggest in this case.

THE TRIBUNAL (Judge Biddle): In relation to the political leaders, let me ask you this, Sir David.

In your opinion, would it be necessary to establish the responsibility of political leaders of lower grades to show that as a group they were informed of plans to wage aggressive war or to commit war crimes or crimes against humanity? In other words, I take it there is some obligation to show that information. Does that rest simply on the fact that these crimes were being perpetrated, or is there any evidence of that information?

SIR DAVID MAXWELL-FYFE: There is evidence, and if I might just indicate the kind of evidence there is -- On the first stage of the acquisition of totalitarian control in Germany, which is the first stage in the conspiracy, apart from the Party program there are the extracts from the Hoheitstraeger

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Magazine; you remember, Hoheitstraeger is all the political leaders. On the anti-semitic part of that, there are documents, which are United States Exhibit 240, and United States Exhibit 332, which are shown in the transcript at pages 1622 and 1649. On the question of war crimes against allied airmen, you will remember that a document was circulated to Reichsleiter, Gauleiter, Kreisleiter, with instructions that Ortsgruppenleiter were to be informed verbally with regard to the lynching of allied airmen. That document is PS-057, shown in the transcript at page 1627. And that the hint was taken by at least one Gauleiter is shown by Document L-154, United States Exhibit 325, at page 1628.

Then, there is a Himmler order to senior SS officers, to be passed orally to Gauleiters, that the police are not to interfere in the clashes between Germans and aviators.

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That is R.-110, United States Exhibit 333, shown at page 1624. There is a speech by Goebbels inciting the people to murder allied airmen, which is shown at page 1625. Similarly, with regard to foreign labor, there is a telegram from Rosenberg to Gauleiters asking them not to interfere with the confiscation of certain companies and banks.

There is Jodl's lecture to Reichsleiters and Gauleiters at a later stage. There is an undated letter from Bormann to all Reichsleiters and Gauleiters, informing them that the OKW had instructed guards to enforce obedience of prisoners of war refusing to obey orders, if necessary with weapons.

THE TRIBUNAL (Judge Biddle): Sir David, if I may interrupt you for a moment. I was familiar with the evidence with respect to the Gauleiters and Reichsleiters. My question, you will remember, was addressed to the lower levels, the Blockleiters.

SIR DAVID MAXWELL-FYFE: Well, I think one can summarize it that even as far as lower levels are concerned you have the four points: You have Mein Kampf, the Party program, Der Hoheitstraeger, and the fact that conferences were constantly held throughout the organization.

As I say, I have dealt with the evidence on the Jews, the lynching of allied airmen, and I think I mentioned the letter from Bormann to the Reichsleiters, Gauleiters, and Kreisleiters about assisting in increasing the output of prisoners of war. Also, there is an instruction from Bormann down to Kreisleiter, about the burial of Russian prisoners of war. There is a decree for insuring the output of foreign workers that goes down towards Gruppenleiter.

All these matters are in evidence, and we submit that there is particul evidence on practically every point. And on the general point, as I said, you have these publications, coupled with the evidence that conferences were held, apart from the general Fuehrerprinzip which would, and did, make the Zellenleiter and the Blockleiter the final weapon for securing that the people acted in accordance with the leader's wishes.

THE TRIBUNAL (Judge Biddle): Let me ask you just two questions, and th

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I will finish with regard to the SA. Would you say that a member of the SA who had joined, let us say, in 1921, and resigned the next year was guilty of conspiring to wage aggressive war and was guilty of war crimes?

SIR DAVID MAXWELL-FYFE: Yes, in this sense. If I may recall, I answered a question that you were good enough to put to me a day or two ago as to when the conspiracy started. A man who took an active and voluntary part as a member of the SA in 1921, certainly, in supporting the Nazi Party, was supporting the published program of the Party whichhad the aims which you have just put to me.

That is certainly put clearly in Article 2 of the Party aim as the getting rid of the dicta of Versailles, the Anschluss, getting the Germans back to the Reich, which, of course, is only a polite way of saying destroying Austria and Czechoslovakia.

Therefore, that man had these aims in view.

With regard to war crimes, I respectfully repeat the answer that I put to you the other day, that it was an essential tenet of the Nazi Party that they should disregard the life and safety of any other people who stood in the way of the securing of their ambitions. A person who deliberately joins an organization with that aim, and with that aim getting more and more clearly related to practical problems as week succeeded week, was taking part in a first essential step of involving mankind in the miseries that we have seen; because it is that tenet, applied to every facet of human life and human suffering, which has caused the crimes which this Tribunal is investigating.

THE TRIBUNAL (Judge Biddle): Well, I can see how you might say that with respect to conspiracy in war crimes, but I want to be perfectly clear also that you say, on the substantive crime of committing war crimes, that a man joining the SA in 1921 and leaving in 1922 would have committed those war crimes in the beginning of 1939.

SIR DAVID MAXWELL-FYFE: If you put to me the substantive war crime, I respectfully remind you that under Article 6 the last words are: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in the execution of such a plan."

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Under the Charter, in my respectful submission, that is enough to make them responsible for the crimes.

THE TRIBUNAL (Judge Biddle): Now only one other question.

What do you contend was the function of the SA after the Roehm purge?

SIR DAVID MAXWELL-FYFE: The function was still to support all Nazi manifestations in the life of Germany. You remember that Dr. Loeffler was careful to accept, very frankly and fairly, the 10th of November, 1938. And I gave another example of how they were informed in the Government General We have also given examples which I think you will find in my appendix of the participation--a limited participation but still a participation--in the war crimes and crimes against humanity.

However, the main point of the SA after that time was to show that here were three million people who had come into the organization, which had providwd the force to bring the Nazis into power; and it had the forceful size of bringing the Nazis into power in those days. They were then joined by two and a half million people, which brought their numbers up, at that time, very high. They went down

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again later on, but they were high in 1939, and they provided a great immoral force behind the Nazi Party. They provided strong support, and were ready on all occasions; whenever a demonstration had to be staged, the SA were there to give their support. They were an essential instrument for maintaining the Nazi control over the German Reich.

THE TRIBUNAL (Judge Biddle): I take it, then, that the function, in your opinion, did not change in substance after the purge? Would you say that?

SIR DAVID MAXWELL-FYFE: The aim didn't change. It didn't need to do half as much, because, of course, by the end of 1933 all the other political parties were broken. Part of the SA's original task, as I think Dr. Loeffler put it, had been to safeguard the defendant Goering when he was making a speech -- I should have put it that it was to prevent the other people having a free run when they made speeches -- and dealing with the clashes between the various groups. That was unnecessary, because all political opposition had been destroyed. Therefore they became rather -- I forget the exact term, but sort of cheer-leaders or a collection of people who would always be ready to give vociferous support.

You must haveheard, your Honor, of the meetings coming over the wireless with regulated cheers. It became more supporting, rather than dealing with opposition, but essentially the aim was the same, to keep the grip.

THE PRESIDENT: It is now nearly quarter past five. Do you think that this discussion can be closed this evening before six o'clock?

DR. DIX (Counsel for defendant Schacht): Mr. President, I believe that in five minutes I can be through with my question.

THE PRESIDENT: All right. Do any of the other prosecutors wish to add anything?

GENERAL RUDENKO: I would like to make a few short remarks, Mr. President.

THE PRESIDENT: How long do you think you will be, General Rudenko?

GENERAL RUDENKO: I think about ten minutes; no more.

THE PRESIDENT: Does the French prosecutor wish to add anything?

M. CHAMPETIER DE RIBES: I have nothing to add.

THE PRESIDENT: Dr. Dix, what I really want to know is whether there

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is any prospect of our finishing this discussion tonight. General Rudenko wishes to speak for about ten minutes, and if the defendants' counsel -- of course, you will understand that a discussion of this sort, an argument of this sort, can't go on forever; and in the ordinary course one hears counsel on one side and counsel on the other side, and then a reply; one does not go on after that. Do you know how many of the defendants' counsel want to speak?

DR. DIX: Mr. President, I know that.

THE PRESIDENT: I think the best t ing would be if we were to adjourn now and to sit in open session tomorrow, and then we shall probably be able to conclude this argument in about an hour. Do you agree with that, General Rudenko?

GENERAL RUDENKO: I agree.

THE PRESIDENT: Do defendant's counsel think we shall be able to conclude it in about an hour tomorrow morning.

(Several counsel nod affirmatively)

THE PRESIDENT: Very well; we will adjourn until ten o'clock tomorrow morning.

(The Tribunal adjourned until 2 March 1946 at 1000 hours)